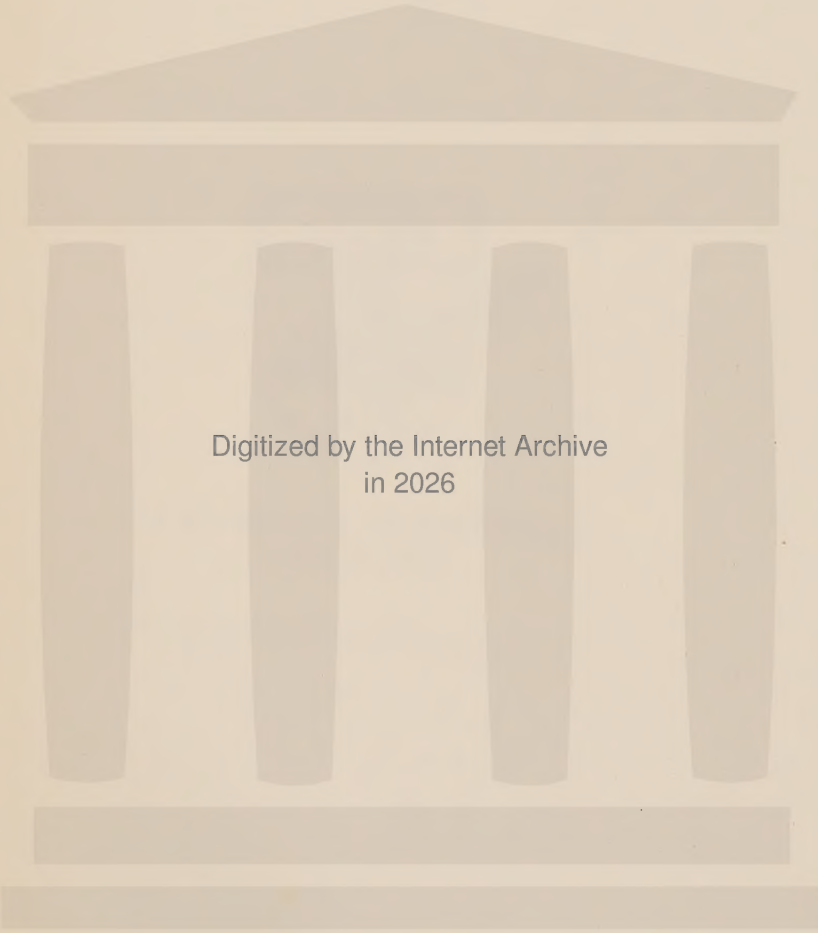


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INTERNATIONAL LAW

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THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE, 1951-54: GENERAL PRINCIPLES AND SOURCES OF LAW

By SIR GERALD FITZMAURICE, K.C.M.G.

Legal Adviser to the Foreign Office

Preface

THIS article starts a second cycle of studies on the work of the International Court of Justice, the first cycle of which appeared in volumes 27, 28 and 29 of this *Year Book* (1950, 1951 and 1952), under the headings respectively of 'General Principles and Substantive Law', 'Treaty Interpretation and Other Treaty Points', and 'International Organizations and Tribunals'.¹ The earlier series dealt with the decisions and opinions of the Court given up to March 31st, 1951, namely, the *Corfu Channel*, *Asylum* (earlier phases), *Injuries*, *First and Second Admissions*, *South-West Africa*, and *Peace Treaties* cases. The present series will deal with the decisions and opinions given between March 31st, 1951, and March 31st, 1954, namely, the *Reservations* (Genocide), *Asylum* (Consequential Points), *Norwegian Fisheries*, *Anglo-Iranian Oil Co.* (Interim Measures and Jurisdiction), *United States Interests in Morocco*, *Ambatielos* (First and Second Phases), *Minquiers and Ecréhous*, and *Nottebohm* (Jurisdiction) cases.

As previously, the present series will be concerned with the findings and pronouncements of the Court, and of individual Judges,² relating to general points of international law and practice, and of general interest as such. Accordingly, no attempt will be made to analyse or embark on a *critique* of the merits of any decision or opinion,³ although in some cases (such as, for instance, the *Norwegian Fisheries* case) the points of general interest are so closely bound up with the central issues involved that some description and evaluation of the latter is necessary.

¹ In this series the treatment is slightly rearranged: the first article deals only with general principles and sources of law, particular topics of international law being deferred to a later article.

² See this *Year Book*, 27 (1950), p. 1, for an explanation of the considerable part assigned in this study to the views expressed by individual Judges, in addition to those expressed in the majority findings of the Court as such.

³ It naturally follows that the commentary and reflexions made on particular findings or pronouncements of general interest are not intended as criticisms of the actual decision or opinion concerned, considered as a whole—since the latter is necessarily the outcome of a combination of different factors, all of which have played a part.

DIVISION A: GENERAL PRINCIPLES

§ I. INTERNATIONAL PERSONALITY. SOVEREIGNTY. PROTECTED STATE

(a) *The general concept of international statehood.* In the *Morocco* case, the Court affirmed the principle that Protected or semi-sovereign States nevertheless have or retain international personality—are international persons—although their position within the international community, and their legal relationship to other States (or international persons not being States—see this *Year Book*, 27 (1950), pp. 3–4), is governed by special considerations (*I.C.J.*, 1952, p. 185):

‘It is not disputed . . . that Morocco, even under the Protectorate, has retained its personality as a State in international law.’

Similarly (*ibid.*, p. 188):

‘The third group of treaties concerned the establishment of the Protectorate. It included . . . the Treaty of Fez of 1912. Under this Treaty, Morocco remained a sovereign State but it made an arrangement of a contractual character whereby France undertook to exercise certain sovereign powers in the name and on behalf of Morocco, and, in principle, all of the international relations of Morocco.’

From these pronouncements, coupled with those made in the *Injuries* case on the question of the international personality of international organizations (see this *Year Book*, 27 (1950), loc. cit. *supra*) the Court can be regarded as having affirmed the general propositions

- i. that all States¹ are international persons; but not all international persons consist of States;
- ii. that not all States are fully independent sovereign States; and that statehood in the international sense may be possessed by not fully sovereign entities—that, in fact, statehood is an attribute of any territorial entity which enjoys some real degree of sovereignty in the *international* field.

Thus, although the concept of (international) statehood involves both international personality and sovereignty, it is not co-terminous with the former and, as regards the latter, does not necessarily imply full sovereign independence. What it does imply, as the necessary attribute of international personality, is the power to enter, directly or mediately, into relationship (by treaty or otherwise) with other international persons.²

¹ The term ‘State’ is naturally used here in the sense of States on the international plane and does not include, for example, the constituent States of a Federation.

² *The hall-mark of international statehood.* It may be asked what is the essential factor that distinguishes international States—even semi-sovereign or Protected States, even States which have placed the whole conduct of their foreign relations in the hands of another State—from entities that are neither States nor international persons. It is not the mere fact that these latter entities are not *independent*, but the fact that they lack that capacity to enter into treaty or other international relationships which is possessed by all international persons, including international organizations (see the Opinion of the Court in the *Injuries* case), and which all

(b) *The nature of a Protectorate or Protected State.* From the above-quoted passages in the judgment of the Court, it might be inferred that, in the opinion of the Court, a State could have or acquire the status of a Protectorate or Protected State, as those terms are generally understood according to international law, and yet *not* (in the language of the Court) have 'retained its personality as a State in international law' or have 'remained a sovereign¹ State'. It is not considered that the Court intended to convey such a view. The matter is partly one of terminology. The word 'Protectorate' is often used to describe not merely a Protected State in the proper sense, but territories such as tribal areas under an indigenous chief which have not the characteristics of States at all, and lack statehood.² A State, whether fully or semi-sovereign, that proceeded to enter into an arrangement, or that passed under a régime, according to which it retained no 'personality as a State in international law', and did not remain even partially 'a sovereign State', would not be, or would cease to be a Protectorate or Protected State altogether.³ It would be a case of absorption or merger, or entry into a Federation; or alternatively of a reduction to a dependence of the type that involves no separate external relations—even through the suzerain State—but only a passive participation in the external relations of the suzerain State itself.⁴ So long as an entity is or remains a Protected State (or Protectorate) it may be dependent, but it is a State and an international person and is in possession of some degree of external sovereignty, even if that sovereignty is exercised mediately—through the agency, or under the *aegis*, of a Protecting State.

international States possess, whether these are fully or only semi-sovereign, and whether the relationship is entered into directly or mediately (i.e. through the agency of a third State having the conduct, in part or in whole, of the external relations of a Protected State). Thus, what distinguishes a Protected State having international statehood from a territorial entity not having it, is not merely the possession of a distinct people, territory, and Government, all of which might be possessed by a colony or a constituent State of a Federation. It is the fact that entities of the latter kind cannot, *as such*, enter into separate international relationships *at all*, even through the agency of another entity. For instance, if a Federal Government enters into a treaty, it does so for the Federation as a whole; and even if in fact the treaty only applies in respect of some particular State of the Federation, it is not entered into for and on behalf of that State as such, and as a separate entity. But a Protecting State acting on behalf of a Protected State as such, can enter into treaties that create relationships between the Protected State and third States to which the Protecting State is not substantively a party, though it is the guardian of them, and the medium through which the relationships are carried on. (For an excellent statement of the whole matter see Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (2nd revised ed., 1945), vol. i, § 7, pp. 22–23.)

¹ That is, in the context, a semi-sovereign State.

² For example, the Swaziland and Bechuanaland Protectorates. This use of the term appertains to the terminology of municipal or constitutional law rather than to international law.

³ In short, the notion of a Protectorate in the *international* sense can be equated with that of a Protected State, although there may be much diversity of detail between different classes of Protectorates.

⁴ Such was broadly the position of most of the princely States of India during the period of British rule, when the Crown stood to them in the relationship not only of Protecting, but also of Paramount Power.

(c) *The relations of a Protecting and Protected State inter se. On what plane do they lie?*

(1) *Incidents of the relationship.* As the passages already quoted from the decision in the *Morocco* case (sub-section (a) above) imply, the incidents of protection depend primarily on the instrument by which the Protectorate is established. This will ordinarily be a treaty or agreement, as in the *Morocco* case, but may take the form of a unilateral declaration by the Protecting State,¹ or (though such a case would now be rare) there might be no specific instrument, and the incidents of the Protectorate would have to be inferred from the circumstances in which it had been established and the manner in which it had been exercised.

(2) *Non-international character of the relationship.* Of more far-reaching import than the detailed incidents of the Protectorate is the character of the relationship between Protecting and Protected State in those cases where—as is the general rule—the Protecting State has the conduct of the external relations of the Protected State. In the *Morocco* case, the Court said (*I.C.J.*, 1952, p. 188):

‘France, in the exercise of this function, [i.e. the conduct of the international relations of Morocco], is bound . . . by the provisions of the Treaty of Fez [establishing the Protectorate] . . .’

This is no doubt true; but it is necessary to ask in what sense the word ‘bound’ is to be understood. Since France under the Treaty had the conduct of Morocco’s international relations, her own relations with Morocco could hardly be of that character, nor Morocco’s with her, or France would have been in the position of, in effect, carrying on relations with herself—or with Morocco through herself. Franco-Moroccan relations must therefore lie on the internal, not the international, plane.² The point would not be affected by the fact that the Treaty of Fez was itself an international instrument even if made between States both of which were *then* (and this is not certain) fully independent³—for this very instrument created relations which were henceforth domestic or internal, just as a treaty between States

¹ For instance, Turkey having declared war against the Allies, Great Britain by a unilateral declaration in December 1914 terminated Turkish suzerainty over Egypt and declared a British Protectorate over that country. This was replaced in 1922 by a further declaration, terminating the Protectorate and declaring full Egyptian independence subject to certain reservations.

² This is one of the principal reasons why it has been maintained in the United Nations Assembly and elsewhere that Franco-Moroccan relations are essentially a matter of domestic jurisdiction within the meaning of Article 2, paragraph 7, of the Charter. In the *Morocco* case before the Court, the issue did not concern Franco-Moroccan relations but the rights of third States in Morocco, and was therefore clearly international. It was precisely for that reason that France conducted it on behalf of Morocco. The point is well put in Hall, *A Treatise on International Law* (8th ed. (1924), p. 150): ‘Their relations [i.e. of the Protectorates] to the protecting State are not therefore determined by international law. It [i.e. international law] steps in only so far as the assumption of the Protectorate affects the protecting country with responsibilities towards the rest of . . . the world.’

³ If this was so: but it is not clear that France has ever admitted it.

merging them in a Union or Federation may be itself international, but the relations of the States under it are henceforth domestic or internal. Consequently, although France (or any other Protecting State in a similar position) is 'bound' by the instrument establishing the Protectorate, a dispute about its interpretation or application could not be an *international* dispute—or the Protecting State as conducting the Protected State's international relations would have to make a claim against itself and argue both sides of the controversy, an evident *reductio ad absurdum* that demonstrates the inherently non-international character of the relationship between Protecting and Protected State.

§ 2. THE DOCTRINE OF THE INTER-TEMPORAL LAW /

(a) *Its character and purpose.* In a considerable number of cases, the rights of States (and more particularly of parties to an international dispute) depend or derive from rights, or a legal situation, existing at some time in the past, or on a treaty concluded at some comparatively remote date. This is more especially the case with claims to territory or territorial waters, bays, &c., or rights in the nature of 'servitudes' over territory; but a similar point might arise in respect of, for example, commercial matters under old but still subsisting treaties, such as the treaties of commerce and navigation which many countries concluded in the seventeenth and eighteenth centuries and which are still in force. It can now be regarded as an established principle of international law that in such cases the situation in question must be appraised, and the treaty interpreted, in the light of the rules of international law as they existed at the time, and not as they exist today.¹ In other words, it is not permissible to import into the legal evaluation of a previously existing situation,² or of an old treaty, doctrines of modern law that did not exist or were not accepted at the time, and only resulted from the subsequent development or evolution of international law. The classic statement of this principle was given in the celebrated award of Judge Huber in the *Island of Palmas* case,³ in which he said that

'... a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled. The effect of discovery by Spain [of Palmas Island] is therefore to be determined by the rules of international law in force in the first half of the 16th century—

¹ The full acceptance of this rule may be said to date from its enunciation in 1928 in the *Island of Palmas* case.

² There is no actual 'date-line' subsequent to which this principle does not operate: theoretically it might apply to quite recent, though past, events. In practice, on account of the comparatively slow evolution of new rules and principles of international law, its application is confined mainly to events and instruments going back to a fairly remote period.

³ The passage in question may be found in the reports given in the *American Journal of International Law*, 22 (1928), p. 883, and the *United Nations Reports of International Arbitral Awards*, vol. ii (1949), p. 845.

or (to take the earliest date) in the first quarter of it, i.e. at the time when the Portuguese or Spaniards made their appearance in the Sea of Celebes.”¹

In the *Morocco* case, the Court applied this principle in the following passage (*I.C.J.*, 1952, p. 189):

‘The Treaty of 1836 replaced an earlier treaty between the United States and Morocco which was concluded in 1787. The two treaties were substantially identical in terms and Articles 20 and 21 are the same in both. Accordingly, in construing the provisions of Article 20—and, in particular, the expression “shall have any dispute with each other”—it is necessary to take into account the meaning of the word “dispute” at the times when the two treaties were concluded. For this purpose it is possible to look at the way in which the word “dispute” or its French counterpart was used in the different treaties concluded by Morocco: e.g., with France in 1631 and 1682, with Great Britain in 1721, 1750, 1751, 1760 and 1801. It is clear that in these instances the word was used to cover both civil and criminal disputes.

‘It is also necessary to take into account that, at the times of these two treaties, the clear-cut distinction between civil and criminal matters had not yet been developed in Morocco.

‘Accordingly, it is necessary to construe the word “dispute”, as used in Article 20, as referring both to civil disputes and to criminal disputes, in so far as they relate to breaches of the criminal law committed by a United States citizen or protégé upon another United States citizen or protégé.’

(b) *Two-way application of the doctrine.* Quite as important as the aspect of the inter-temporal law described above, is its corollary. The *continued* existence at the present time of a right which existed once in the light of the law as it then stood, depends on the law as it stands now, and on conformity with the present requirements of the law: a right which once existed does not necessarily continue to exist, if in the meantime developments in the law have introduced new criteria governing the existence of such a right. In short, rights, in order to be valid today, must be kept up in accordance with the changing requirements of the law. This principle also was enunciated by Judge Huber in the *Palmas Island* case² as follows:³

‘If the view most favourable to the American arguments is adopted—with every reservation as to the soundness of such view—that is to say, if we consider as positive law at the period in question the rule that discovery as such, i.e. the mere fact of seeing land, without any act, even symbolical, of taking possession, involved *ipso jure* territorial sovereignty and not merely an “inchoate title”, a *jus ad rem*, to be completed

¹ The point was that as the law relating to title to territory stood in the sixteenth century, it could be argued that discovery *per se*, without effective occupation, conferred actual title and not merely an inchoate right.

² *Loc. cit. supra.*

³ Another statement of the same principle in a slightly different context was given by Judge Huber in a passage on pp. 875 and 839 respectively of the two Reports cited *supra*, p. 5, n. 3, reading as follows:

‘. . . it cannot be sufficient to establish the title by which territorial sovereignty was validly acquired at a certain moment; it must also be shown that the territorial sovereignty has continued to exist and did exist at the moment which for the decision of the dispute must be considered as critical.’

eventually by an actual and durable taking of possession within a reasonable time, the question arises whether sovereignty yet existed at the critical date,¹ i.e. the moment of conclusion and coming into force of the Treaty of Paris.²

Judge Huber continued:

‘As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.’

In the *Minquiers* case, the Court too applied this principle, in considering whether an alleged feudal title to certain islets—even if it once existed and had not subsequently lapsed in consequence of later events—would today be sufficient *per se* to confer title in the absence of that effective occupation which, in general, modern law requires as a condition of title to territory (*I.C.J.*, 1953, p. 56):³

¹ The topic of the ‘critical date’ in respect of claims to territory will be discussed in relation to the *Minquiers* case in the next issue of this *Year Book*.

² The Treaty of Paris was the Treaty of Peace between the United States and Spain of December 10th, 1898, by which, if Spain then had sovereignty over the Island of Palmas, it would have been ceded to the United States.

³ For a full statement of the doctrine of the inter-temporal law see the United Kingdom argument in the *Minquiers* case (Oral Arguments, Doct. Distr. 53/156, pp. 34–44).

The point also arose in the *Ambatielos* case (Second Phase), though it was not then pronounced upon by the Court. The Greek Government were seeking to show that a certain complaint was ‘based’ on the provisions of an Anglo-Greek Treaty of Commerce and Navigation. In fact the complaint appeared to be based far more on the general rules of international law regarding denial of justice and the treatment of foreigners before the courts than on the provisions of a commercial treaty. However, it was part of the Greek contention that the general rules of international law on these topics were incorporated in the Treaty by the combined operation (a) of its most-favoured-nation clauses, (b) of provisions in old seventeenth and eighteenth century treaties by which Great Britain was alleged to have accorded specifically to certain other countries rights equivalent to a grant of those involved by the general rules of international law relating to the administration of justice. It was contended for the United Kingdom (i) that even if the actual phraseology of the provisions in question meant what the Greek Government contended, these provisions could not be understood as covering what was now covered by the general rules of international law governing denial of justice, treatment before the courts, &c., because, at the date of these Treaties, these rules scarcely existed, or were in their infancy; (ii) that even if the Treaties did confer certain rights which were now rights under general international law also, those rights today were no longer grounded on any mere bilateral treaty but precisely on these rules of international law which had since become generalized, had passed into customary law, and were now the true foundation of the rights in question. A complaint of a violation of these rights was therefore essentially one ‘based’ on general international law and not on specific treaty provisions. The following passage from the United Kingdom Oral Argument (Doct. Distr. 53/50, p. 62) illustrates the point:

‘Now, if we apply that principle to the present case, what do we find? Suppose, for the sake of argument, that some clause of one of these seventeenth century Treaties can be read as conferring a right to certain treatment in the courts, which is now a general international law right. But that would mean that, precisely because the treaty right in question is to-day a general international law right, its treaty basis, though not formally destroyed, is no longer the real foundation of the right. It has been superseded, and, so to speak, engulfed, and rendered superfluous by the emergence of general rules of international law that take its place, that include it and, indeed, go far beyond it, so that the right now depends on and results from those rules rather than the treaty. These seventeenth century Treaties are, of course, still in force as treaties.

'These opposite contentions are based on more or less uncertain and controversial views as to what was the true situation in this remote feudal epoch. For the purpose of deciding the present case it is, in the opinion of the Court, not necessary to solve these historical controversies. The Court considers it sufficient to state as its view that even if the Kings of France did have an original feudal title also in respect of the Channel Islands, such a title must have lapsed as a consequence of the events of the year 1204 and following years. Such an original feudal title of the Kings of France in respect of the Channel Islands could to-day produce no legal effect, unless it had been replaced by another title valid according to the law at the time of replacement. It is for the French Government to establish that it was so replaced. The Court will later deal with the evidence which that Government has produced with a view to establishing that its alleged original title was replaced by effective possession of the islets in dispute.'

§. 3. THE BASES AND FOUNDATION OF STATE RIGHTS. INTERNATIONAL LAW AS CONSTITUTIVE OR MERELY REGULATIVE OF SUCH RIGHTS

(a) *Do the rights of States derive from international law, or does the latter operate merely as a restriction on what are otherwise and in principle unlimited State rights?*

(1) *The issue stated.* In the *Fisheries* case, the Norwegian Government in its final conclusion and after reciting that the Norwegian Decree establishing base-lines for the delimitation of Norwegian territorial waters was 'not inconsistent with the rules of international law binding upon Norway', asked the Court

'to adjudge and declare that the delimitation of the fisheries zone¹ fixed by the Norwegian Royal Decree of July 12th, 1935, *is not* contrary to international law' (author's italics);

and the Court, in the '*dispositif*' of its judgment, found that

'... the method employed for the delimitation of the fisheries zone¹ by the Royal Norwegian Decree of July 12th, 1935, *is not contrary to international law*; and ... that the base-lines fixed by the said Decree in application of this method *are not contrary to international law*' (author's italics).

The issue here involved is one of the greatest importance, not only as a matter of principle—because it goes to the root of State rights, the relationship of State sovereignty to international law, and also the whole concept

But the operative effect of many of the individual provisions of those Treaties is spent, because they have been superseded, overtaken, caught up, rendered unnecessary, by the emergence of general rules of international law on the subjects of those provisions dealt with, which now constitute the real basis of the rights and obligations existing between the parties on this matter.'

¹ Although here related to a so-called 'fisheries zone', it was made clear in the course of the case that what was really involved was a delimitation of Norwegian *territorial waters*, since it is, normally, only on the basis of a claim to certain waters as territorial (or else internal) that a claim to an exclusive fisheries zone can be maintained. That the Norwegian *interest* in the matter was mainly a fisheries one did not alter the point. The Court said (*I.C.J.*, 1951, p. 125):

'Although the Decree of June 12th, 1935, refers to the Norwegian fisheries zone and does not specifically mention the territorial sea, there can be no doubt that the zone delimited by this Decree is none other than the sea area which Norway considers to be her territorial sea. That is how the Parties argued the question and that is the way in which they submitted it to the Court for decision.'

of the rule of law in international relations—but also because of the decisive effect it may have on the outcome of a litigation.¹ The issue of principle is whether State rights derive from and depend upon international law, or whether they are absolute, and in their origin independent of it, international law merely operating as a restriction on these rights.² In litigation, this issue presents itself in the following form: must a State, the validity of whose action in a particular respect is challenged, show that such action is—at any rate *prima facie*—justified by a positive rule of international law, or is it sufficient merely to establish that the action in question is not actually contrary to international law? It can of course be argued that the distinction is immaterial in the sense that what is in accordance with international law is not contrary to it, and what is contrary to it is not in accordance with it. But such a view would be superficial, because it would fail to take account of the extent to which, in many important fields, the rules of international law are still unsettled or controversial, or in process of change or development. In any case, the practical difference from the standpoint of the litigant is enormous, if only because of the effect produced on the incidence of the burden of proof.³

(2) *International law the foundation and not merely limitation of State rights.* It may be true to say that historically, or originally, State rights (that is, in the case of sovereign independent States) were unfettered, and that States were free to do what they chose, subject only to their inherent capacities, political influence and military power. Even this proposition can be controverted;⁴ but, to the extent to which it is true, rules of international

¹ It is not too much to say that in the last analysis the *Fisheries* case was lost and won on this issue. The Norwegian Government was obviously in a very strong position if all it had to do was to show that its action was 'not contrary to' international law—for if it could establish that the rules of international law relative to territorial waters were unsettled or controversial, all that need then be shown was that the Norwegian Decree did not actually contravene any recognized rule. The Norwegian Government's task would obviously have been a much more difficult one if it had had to adduce some positive rule of international law in justification of its action, and show that the latter was in accordance with this rule.

² This last was in fact the attitude taken up by the Norwegian Government in the *Fisheries* case, at any rate so far as State rights over the sea were concerned.

³ *The burden of proof.* It can no doubt also be argued that *actori incumbit probatio*. The plaintiff State must prove its case and show that the action complained of is illegal and contrary to international law: therefore all that the defendant State has to do is to show that its action is 'not contrary to' international law. This, however, begs the question, and confuses what it is the defendant State has to establish with the process of establishing it. If the plaintiff State is to show (as it must) that the action of the defendant State is illegal, it must first show what are the positive rules of international law governing the matter, and secondly that the action of the defendant State does not conform to these rules. The defendant State can reply either by showing that the rules are not as alleged but different (and that they justify its action), or that although they are as alleged, its action is in conformity with them. At this point indeed it may suffice to show that the action is not contrary to the rules: *but this will only be because positive rules governing the matter are established or admitted as existing*. This is quite a different thing from a plea that the action is not contrary to international law in general, without establishing or admitting any foundation in law for the action in question other than that it is not expressly prohibited.

⁴ The very cradle of international law—central and western Europe—if considered at the

law would doubtless have appeared in the beginning as restrictions on State action, as limitations on rights otherwise without legal limit.¹ The rights of States would have appeared to be grounded in, and to spring from, their inherent sovereignty, and not from the permissive effect of any systems of legal rules.² But whatever the position may once have been, and even if this was the position, is it still the position today? It is submitted that it is not, and that the view of the foundation of State rights just described is, under modern conditions, obsolete, unscientific and retrograde, and contrary to the spirit and real needs of the progressive development of international law. It leads in the final analysis to anarchy, since in the absence of any clearly proved restricting rule it makes the rights and actions of States dependent in the last resort on their own will and nothing else.³ A great authority⁴ has expressed the view that

'The sovereignty of the State in international law is [*sc. itself*] a quality conferred by international law. It cannot, therefore, be either the basis or the source of the law of nations.'

Despite the wording of the *dispositif* of its judgment in the *Fisheries* case (cf. *supra* under (I))—a matter which will be further discussed presently—it would seem that the Court held the same view as that expressed in the passage just quoted. It was in fact precisely the Norwegian contention in that case that legally and historically the rules of international law relating to territorial waters appeared as restrictions on State sovereignty over the sea and not as the foundation of such sovereignty—in other words, States had in the last resort an unlimited right to appropriate areas of sea at will, subject only to any positive rules of international law that could be shown to restrict their right to do so.⁵ The Court, while agreeing that Norway's

earliest date when it can be said to have had a definite political character—consisted of a feudal society in which even the most powerful independent princes were related to one another by strict feudal ties and by a system of detailed feudal rights and obligations (cf. the United Kingdom argument in the *Minquiers* case, speeches of Professor Wade, *passim*: Doct. Distr. 53/156 and 53/156 *ter*).

¹ It is in fact much more probable that even the early developments of international law—e.g. in the fields of diplomatic immunities, sea law, treaty formalities—appeared as an enlargement of rights rather than as an acceptance of restrictions; or else as a practical regulation necessary for carrying on certain political or economic activities (i.e. again, as *enabling* rather than prohibiting).

² This is in fact the view maintained as still applicable under modern conditions by important schools of thought.

³ This was in fact precisely the contention advanced by Norway in the *Fisheries* case in the field of claims to sea areas. But this view was rejected by the Court.

⁴ See Lauterpacht, *The Function of Law in the International Community* (1933), pp. 95–96.

⁵ What this can lead to is shown not only by the exaggerated (but eventually abandoned) claim to whole tracts of sea made by maritime States in the seventeenth century, but also by the claims made by a number of States today, not merely to the sea bed off their coasts (continental shelf) up to a distance of 200 miles, but to the waters above it. The Norwegian argument ignored the fact that if the rules of international law respecting territorial and coastal waters did appear as restrictions on the sovereignty of the coastal State, they would, by a complementary process, equally appear as restrictions on the sovereignty of all other States; for if waters are admitted as territorial, other States are deprived of their free use for fishery and similar purposes as part

method of delimiting her territorial waters was legitimate in the particular circumstances of her geographic and economic position, refused to accept this sweeping doctrine, and pronounced as follows (*I.C.J.*, 1951, p. 132):

'The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. . . . the validity of the delimitation with regard to other States depends upon international law.'

Moreover, it is particularly noticeable that the Court was not deterred from taking up this attitude by the fact that (as was strenuously maintained by Norway) the rules of international law regarding territorial waters might be regarded as unsettled or controversial on a number of points—for the Court prefaced the passage just quoted with the following one (*ibid.*):

'It does not at all follow that, in the absence of rules having the technically precise character alleged by the United Kingdom Government, the delimitation undertaken by the Norwegian Government in 1935 is not subject to certain principles which make it possible to judge as to its validity under international law.'

The matter was also referred to by Judge Alvarez in his separate Opinion (*ibid.*, p. 152):

'It is also necessary to pay special attention to another principle which has been much spoken of: the right of States to do everything which is not expressly forbidden by international law. This principle, formerly correct, in the days of absolute sovereignty, is no longer so at the present day . . .

'Any State alleging a principle of international law must prove its existence . . .'

Similarly, Judge McNair in his dissenting Opinion (but concurring on this point) said (*ibid.*, p. 160):

'While the actual delimitation of the frontiers of territorial waters lies within the competence of each State because each State knows its own coast best, yet the principles followed in carrying out this delimitation are within the domain of law and not within the discretion of each State.'

If these views are correct—and no others would appear to be consonant with the requirements of the rule of law in international relations²—it follows that a State the legal validity of whose action is challenged must be prepared to show *either* that the action is justified by international law

of the high seas. Thus the two sets of sovereignties and restrictions cancel out, and the sole relevant question is, what waters does international law *permit* a coastal State to have, and compel the non-coastal State to recognize as territorial in character?

¹ In other words, the fact that the rules of international law on a given subject are unsettled or controversial or not universally agreed, does not justify the view that States are entitled to do anything within that field which cannot be shown to be positively forbidden by some accepted rule. There are always ultimate principles by which the validity of State action can be determined on a positive basis.

² Professor Lauterpacht has pointed out (*op. cit.*) the great dangers to international law of a system which, while postulating the formal completeness of international law, has recourse to concepts of absolute sovereign right as a means of filling what would otherwise be gaps in this system.

(whether expressly or as a necessary implication from some affirmative rule), or that the action is in a field which international law does not purport to regulate at all (as to which see under (3) (i) below). It is not enough merely to show that the action is 'not contrary to international law'. The moment the ultimate foundation of State rights is sought in State sovereignty, law suffers, because the rights in question tend to cancel out; there is in fact no reason why the sovereign right of any one State should prevail over that of another *except* by reference to an overriding legal system from which sovereign rights themselves spring.¹ If this were not so, and if the rights of States had, by virtue of their sovereignty, to be regarded as absolute except in so far as restricted by some positive prohibition of international law, the outcome of a great many disputes would depend largely on the accident of which side was plaintiff and which defendant; and a party to a dispute would only have to manœuvre itself into the position of defendant (which would in many cases be quite easy) in order to benefit at once from a presumption in favour of the legality of its action, deriving from its sovereignty, and from only having to show that this action was not contrary to international law—indeed it would be for the plaintiff to show that it was so contrary.² A premium would then be placed on

¹ This point was put with much force by Sir Eric Beckett on behalf of the United Kingdom in the *Fisheries* case (see Volume IV of the *Pleadings, Oral Arguments, Documents*, p. 33):

'Nor, for that matter, is there any presumption in favour of the validity against one State of the sovereign act of another State—except perhaps in the case of an act performed within the latter's territory, and the exception, if there is one . . . , cannot apply where the issue is whether the waters in question are Norwegian or not.'

² In the *Fisheries* case, for instance (as was pointed out by Counsel for the United Kingdom), it would have been quite possible for the United Kingdom Government—but for its desire to avoid provocative action—to have forced Norway into the position of plaintiff in the case. Instead of merely complaining at the Norwegian Decree drawing Norway's territorial waters from base-lines instead of low-water mark, and taking Norway to the Court on the question of the validity of that Decree, the United Kingdom Government could have put the validity of its own action in question, thus compelling Norway, if she wished to benefit from her Decree, to take the initiative in going to the Court. The United Kingdom Government could, for instance, have announced that as it could not admit the validity of Norway's base-line method of delimiting her waters, it would regard British vessels as entitled to fish up to a line drawn three (or four) miles from low-water mark on the Norwegian coast, and would if necessary afford such vessels naval protection. Had this been carried out, it would then have been for Norway to complain of what she would have regarded as an illegal use of, and action in, her waters. As defendant to such a complaint before the Court, however, it would have been the United Kingdom which would have been in the happy position of only having to show that her action was 'not contrary to international law'; and hers equally would have been all the benefit (which in actual fact was reaped by Norway) of any doubts as to the exact rules of international law regarding territorial waters—for unless Norway could have shown that international law clearly favoured the base-line rather than the tide-mark rule (which would have been impossible), or alternatively that it actively provided for and positively sanctioned a base-line rule (which would have been difficult to show affirmatively except for the case of relatively small bays), the presumption would have been that the areas in question remained high seas in which foreign vessels had a perfect right to fish, and could be given naval protection from what would be illegal interference.

It was because of the impossibility of admitting that the outcome of disputes could properly be dependent on accidents or manœuvres of this kind, that the United Kingdom Government urged that neither side should be under an unqualified burden of proof, and it must be for each side to justify its position by reference to positive rules and principles and bear the burden of proving the

occupying the position of defendant, for a standing presumption of law in favour of the defendant would be created, giving an advantage going far beyond the natural and inevitable advantage derived by a defendant from the fact that the plaintiff must begin and must in the first place make out at least a *prima facie* cause for complaint. The advantage thus conferred would, in turn, put a premium on the type of State action which takes place on the borderland of legal validity—for unless such action could be shown to be actually illegal, its legality in favour of the defendant would have to be presumed (it would be 'not contrary to international law').

(3) *Exceptions to this principle.* Certain exceptions, real or apparent, to these principles must be noticed, arising from situations in which it can reasonably be said that a State is justified if its action can be shown to be, simply, 'not contrary to international law'.

(i) *Where the action is in a field not governed or regulated by international law at all.*¹ In such a case (but see n. 1) it is obvious that there could be no question of any positive justification of the action according to international law: therefore to say that the action was 'not contrary to international law' might be true in the sense that international law had no application to the case.² It is, however, important to notice that the mere absence of a specific rule governing a particular point, or aspect of the matter, is not sufficient to bring the exception into play if the field *as a whole* is regulated by international law, *or is one in which principles of international law find a sphere of application.* Accordingly, in the *Fisheries* case, the United Kingdom Government maintained (and was on this point upheld by the Court—*vide* under (2) above) that the absence of precise or fully agreed rules governing the delimitation of territorial waters did not mean that such delimitation could be effected at the sole will of the coastal State in the exercise of its sovereign rights.³ Similarly, since the tide-mark rule could be shown to represent the practice of the great majority of States, the base-line method could only be justified, if at all, by special circumstances. The fact that not *all* States followed the tide-mark rule (if that were so) could not of itself mean that another practice was 'not contrary to international law' and therefore justified. What the Court really found in the *Fisheries* case (despite the wording

existence of those it relied on. Unless this were so, then, in any case where the rules were in doubt, the plaintiff could never win, and whichever side had allowed itself to get into the position of plaintiff must lose.

¹ Those who postulate the formal completeness of international law would not admit the existence of such a case, but would describe it as 'a field in which by international law, the action of States is left entirely to their discretion'. It will, however, be convenient to treat this here as a separate case (*vide* sub-head (iii)).

² Again, it can of course be maintained that it is, even so, by international law itself that it has no application to the case, other than a negative one. But this involves issues of legal philosophy that cannot be discussed here.

³ The Court in fact laid down a number of criteria to which any such delimitation must conform in order to be valid under international law. This matter will be discussed in a later article.

of the *dispositif* of the judgment) was that there existed a *positive* rule of international law permitting the use of base-lines, in circumstances such as Norway's (see further under sub-section (b), p. 18, below).

(ii) *Fields in which international law operates exclusively or largely by means of prohibitions.* There may be fields (such as war crimes, crimes against peace and humanity, illegitimate weapons of war and methods of attack, action on the high seas in peace-time) where, owing to the inherent character of the subject-matter, international law actually operates largely, or mainly, as a system of prohibitions, and lays down few permissive rules, so that it can fairly be said that all that is not forbidden is permitted. Where the offence consists, and can only consist, in the violation of a specific prohibition, it must obviously be a sufficient defence to show that the act concerned did not involve such a violation, and was therefore 'not contrary to international law'.

(iii) *Fields which international law leaves entirely to the discretionary action of States.*¹ This is in a sense merely a different aspect, or a restatement, of exception (i). But it is worth separate mention because it illustrates very well the fundamental issue in the *Fisheries* case. No one would dispute the proposition that within their own territory (or jurisdictional sphere), or in relation to their own nationals, States are, generally speaking, entitled to do as they please, subject to any prohibitions imposed by international law and to the performance of any positive obligations it enjoins.² In the *Fisheries* case it was part of Norway's argument that this was in fact the position: Norway was delimiting her own waters off her own coast, and unless the United Kingdom was able to show some positive rule of international law prohibiting the use of base-lines for this purpose, Norway was entitled to make use of them. Although the Court found that Norway was in fact justified in using base-lines, it did not so find on those grounds, and indeed rejected this argument (see under (2) above). The Norwegian way of putting the case tended to avoid the fact that the issue lay only partly in the question of the point or line along the coast from which territorial waters should be drawn—for the *effect* of Norway's method of delimitation from

¹ For example, the field of a State's domestic jurisdiction: while it may be controversial exactly what this includes, there can be no doubt that in regard to anything that is in fact included, it is precisely the essence of the matter that the discretion of the State is absolute and unfettered by international law.

² *The burden of proof.* There might broadly be said to be three principal cases: (1) within its own territory and (undisputed) waters, or in regard to its own nationals, a State's action is in principle free by virtue of its sovereignty, and it is for the other party to any dispute to establish *prima facie* the existence of a specific restriction or obligation on the territorial State; (2) outside its own territory and waters, and in regard to foreigners, a State has in principle no rights other than such as result from any *permissive* rule of international law, and the onus of proving such a rule lies on the State invoking the right; (3) finally, the issue may be *whether* the territory or waters do in fact belong to the State claiming to exercise sovereign rights there, and the onus of proving that they do must rest on that State.

base-lines drawn from point to point enclosing considerable stretches of sea, was to appropriate or lay claim (whether as territorial or internal waters) to extensive areas that had formerly been regarded as high seas. The whole issue therefore was not Norway's right to do as she pleased with her own, but *whether it was* her own. The real issue was what were the conditions, if any, on which Norway was entitled to appropriate and incorporate into her territory or waters various pieces of sea. Put in this way, it seems obvious that it could not be sufficient to show that the appropriation¹ was not contrary to international law, but that it required to be justified by reference to a positive right. Under all systems of law, the acquisition of property (whatever the subject-matter) is governed by positive rules that lay down the circumstances in which the acquisition is valid. It would never normally be the case that any acquisition was valid which was not actually prohibited or contrary to some rule. This is clearly the position under international law as regards the acquisition or existence of title to land territory,² and it is difficult to see why there should be any difference in the case of maritime territory.³ Indeed, the case is stronger, for if it be considered as one of occupation of something over which no other State has sovereign rights—a *res nullius*—then, whereas in the case of land the acquisition of *terra nullius* will not prejudice the rights of other States, the assumption of jurisdiction and control over areas of high seas is an encroachment on the rights of other States, for all States have rights on the high seas and an interest in preserving them as such. A clearer case could scarcely be imagined for subjecting the matter to positive conditions and not merely to an absence of prohibitions or limitations. The foregoing views find support in the judgment delivered in the *Fisheries* case by Judge Read, whose opinion on this point was the same as the Court's. (*I.C.J.*, 1951, pp. 189-90):

‘It has been contended that such a claim can be derived from the sovereignty of the coastal State, but I do not see how this can be. Here, we are not dealing with the exercise, by a State, of sovereignty within its domain. We are dealing with State action which extends its domain, and purports to exclude all other States from areas of the high seas. We are dealing with expansion of the maritime domain designed to deprive

¹ It was of course part of the Norwegian case that there had been no (new) appropriation, because Norway had always claimed the waters concerned and regarded them as hers. This, however, was based on the plea of historic rights and involved quite a different point.

² Which involves physical occupation, accretion, cession, merger or something else positive.

³ It is frequently overlooked that when a straight base-line is drawn between two points, say two islands off a coast thirty miles apart, the effect is not merely to claim a far greater total breadth of waters than if these were measured from low-water mark along the coast (since the territorial waters are now measured from a base-line standing itself well out to sea along most of its length), but also to convert into national or *internal* waters the whole area of water *behind*, and enclosed by, the base-line. Such waters become in effect part of the land domain—even if they are regarded, as they ought to be, as being still subject to a right of innocent passage for foreign vessels. Accordingly, the acquisition of such waters ought to be governed by compliance with positive conditions, just as in the case of the acquisition of land territory.

other States of rights and privileges which, before the extension, they were entitled to enjoy and exercise, under the rules of international law.

'In these circumstances, I should have much difficulty in justifying the Norwegian system as an exercise of powers inherent in State sovereignty.

'The question remains: whether action by a State, encroaching on the high seas and depriving other States of their rights and privileges, can be justified by customary international law.

'The true legal character of the problem has been obscured. It has been treated as if the issue concerned the existence or non-existence of a rule of customary international law restricting the exercise of sovereign power by coastal States. It has been assumed that the United Kingdom must establish the existence of such a restrictive rule in order to challenge the validity of the 1935 Decree. It has been suggested that the British case must fail, unless it can be proved that such a restrictive rule is founded on customary international law.

'The actual legal problem with which we are concerned is different. By the Decree of 1935, Norway has attempted to enlarge the Norwegian maritime domain and to encroach on extensive areas of the high seas, and has seized and condemned foreign ships. Accordingly, we must consider whether such a course is justified. Disregarding, for the time being, the historic factor, we must begin by examining the extent of the power to delimit its maritime domain, given to a coastal State by international law.

'Here, I have no doubt about the position. The power of a State to delimit its maritime domain is the same as its power to delimit any other part of its domain. It can extend its domain in any way that does not impair the rights of other States or of the international community: e.g., it can occupy no man's land, *res nullius*; or it can annex occupied territory, with the consent of the territorial sovereign. It cannot go beyond the territorial limits of its existing sovereignty, if such a course impairs rights or privileges conferred on other States by international law.

'No question of *res nullius* or annexation arises in the case of the sea. All nations enjoy all rights and all privileges in and over all of the sea beyond the limit of territorial waters. It follows that the power of a coastal State to mark out its maritime domain cannot be used so as to encroach on the high seas and impair these rights and privileges. Its power is limited to the marking out of areas already subject to its sovereignty.'

(iv) *The Lotus case*.¹ This case affords a very good touchstone of some of the propositions advanced above, since it is usually cited as authority for the view that States are free to act as they please in the international field, on a basis of sovereignty, except to the extent that international law imposes some express prohibition; and, further, that the presumption is against such restrictions, so that any action 'not in conflict with the principles of international law' (the phrase used in the Franco-Turkish *Compromis* submitting the dispute to the Permanent Court²) is *ipso facto* valid, or at any

¹ *Permanent Court of International Justice*, Series A, No. 10. The point at issue was whether the Turkish courts could properly assume jurisdiction to try the French officer of a French merchant vessel which had come into collision with and sunk a Turkish vessel on the high seas, and had afterwards proceeded to a Turkish port where the officer was arrested.

² This phrase, a very unfortunate one for the French case, probably decided the outcome, which was finally dependent on the President's casting vote. However, the presence of this phrase in the *Compromis*, which, as being the basis of jurisdiction in the case, the Court was bound to apply strictly, is alone sufficient to prevent the judgment from being authority for the proposition contained in the phrase considered as an *abstract* and independent rule of law. The

rate not impugnable internationally. A careful reading of the Judgment, however, throws doubt on whether the *dicta* in these senses were more than *obiter*, or formed the real *ratio decidendi*.

a. Apart from the fact that a number of other considerations were involved, it appears in the first place that the Court tended (whether correctly or not is immaterial for present purposes) to regard the subject of jurisdiction in respect of collisions on the high seas, even between ships of different nationalities, as one not regulated at all by international law, and therefore as one with regard to which States could do as they thought fit provided they confined their action in the matter to their own territory.

b. Alternatively, the Court seems to have based itself on the undoubted general right of a State to act as it pleases *in its own territory* (see sub-head (iii) above) subject to any express prohibitions or obligations imposed by international law. On that basis it could be held that so long as no express rule existed assuming jurisdiction over offences against its nationals committed by foreigners on the high seas, there was no reason why it should not do so by action within its own territory if that was effective in the circumstances. But in the *Fisheries* case the whole issue was whether the waters concerned were Norwegian, and in consequence the following passage from the *Lotus* case referring to jurisdiction was applicable:

‘... it cannot be exercised by a State outside its territory *except by virtue of a permissive rule* derived from international custom or from a convention’. (Author’s italics.)

c. Next, the effect of any presumptions in favour of sovereignty, and of the *prima facie* absence of restrictions on it, that might have been produced by the general *dicta* in that sense emitted by the Court, was nullified by the fact that the actual process complained of—the assumption of jurisdiction over a French national in respect of something done by him on the high seas—occurred in Turkish territory, i.e. in the Turkish courts, in respect of a vessel and a person present within the jurisdiction. In the *Fisheries* case, on the other hand, arrests of British vessels had taken place in disputed waters where there could be no *presumption* of Norwegian sovereignty. The arrests might be lawful, but only because the waters were *in fact* by international law Norwegian, not because Norway must be presumed to be entitled to exercise her jurisdiction there in the absence of any rule forbidding her to do so.¹

Court can be regarded as applying the criterion of non-conflict with the principles of international law because the *Compromis* directed it to do so, rather than because this criterion had any abstract validity. But it is an object lesson in the need for extreme care in framing these instruments. Had the Court been asked to determine whether the Turkish action was in conformity with international law, the decision would almost certainly have been the other way, in view of the very narrow, even nominal, majority.

¹ See paragraph 216 of the United Kingdom Written Reply (*Pleadings, Oral Arguments, Documents*, vol. II, pp. 462–3).

d. Finally, there were some, though perhaps not very good, grounds for regarding the subject-matter of the case as lying to some extent in a field in which the operation of international law manifested itself mainly in the guise of prohibitions or limitations on action, whence it would follow that in the absence of any prohibition touching the particular act concerned and causing the act to be 'in conflict with' international law, the latter had nothing to say in the matter, and the act must therefore be regarded as legitimate.

(b) *The attitude of the Court in the Fisheries case.* This has to some extent been dealt with on pp. 8-13 above. It is, however, clear from various passages in the Judgment that, despite the wording of the *dispositif*, the Court's finding was based on something much more positive and concrete than the belief that Norway's delimitation of her waters was 'not contrary to international law'. Leaving aside for later treatment the geographic and economic factors which caused the Court in effect to postulate the existence of a positive rule of international law justifying the adoption of base-lines in certain circumstances, the general attitude of the Court can be sufficiently seen from the following passage (*I.C.J.*, 1951, p. 131):

'Consequently, the Court is unable to share the view of the United Kingdom Government, that "Norway, in the matter of base-lines, now claims recognition of an exceptional system". As will be shown later, all that the Court can see therein is *the application of general international law to a specific case.*' (Author's italics.)

Judge Hsu Mo, who delivered a separate but, on the main issue, concurring, Opinion, expressed a similar view (*ibid.*, p. 154):

'... Norway's method of delimiting the belt of her ... territorial sea ... constitutes a deviation from ... a general rule of international law, namely, that ... the belt of territorial sea should be measured, in principle, from the line of the coast at low tide. *International law permits, in certain circumstances, deviations from this general rule ...* Norway is justified in using the method of straight lines because of her special geographical conditions and her consistent past practice ...' (Author's italics.)

§ 4. UNIVERSALITY AND UNIFORMITY OF THE RULES OF INTERNATIONAL LAW

(a) *Do exceptional circumstances justify a departure from the normal rules, or the application of a different rule from the normal one?*

(1) *Does the Court's Judgment in the Fisheries case warrant an affirmative answer?* To this question, considered as an abstract proposition, the answer must clearly be in the negative, or international law would lose all stability and cohesion. Yet, in the *Fisheries* case, the Court based its Judgment very largely on such factors as the exceptional character of Norway's coast, the

marked dependence of the population of northern Norway¹ on fishing, and so on.² However, it does not seem that the Court intended by this to postulate any general principle allowing the application of a different rule from the normal because of exceptional circumstances. Rather does it seem that the Court intended to suggest that the existence of exceptional circumstances might indicate that the normal rule could not be regarded as being of universal application, because of the difficulty or impossibility of applying it in certain cases which nevertheless had to be provided for.³ Thus the Court, discussing what it regarded as one form of the low-water-mark rule,⁴ said (*I.C.J.*, 1951, pp. 128-9):

'This method may be applied without difficulty to an ordinary coast, which is not too broken. Where a coast is deeply indented and cut into, as is that of Eastern Finnmark, or where it is bordered by an archipelago such as "skjaergaard"⁵ along the western sector of the coast here in question, the base-line becomes independent of the low-water mark, and . . . the line of the low-water mark can no longer be put forward as a rule requiring the coast line to be followed in all its sinuosities;⁶ *nor can one speak of exceptions* when

¹ The dispute related exclusively to the waters of northern Norway within the Arctic Circle from Traena (a little south of the Vestfjord) to the Varangerfjord on the Russian border, because this was, at the time, the only part of the Norwegian coast off which the waters had been delimited in detail.

² See in particular pp. 127-9, 133, 139 and 142 of the Judgment.

³ Whether the tide-mark rule was in fact impossible of application to the Norwegian coast is immaterial for present purposes, but the United Kingdom Government pointed out that the west coasts of Scotland and Ireland were very similar to the Norwegian—yet the tide-mark rule had always been employed there and had caused no difficulty. The dissenting Judges made the same point—cf. Judge McNair at pp. 169-71, and Judge Read, as regards the coasts of Canada, Alaska and Nova Scotia, at pp. 193-4.

⁴ The Court was here speaking of the *tracé parallèle*, which is not actually a method of drawing the base-line along the coast at all, but of tracing the outer (seaward) limit of the territorial belt—and one in fact never used because of its impracticability. It is not strictly even a method of doing that, but an expression first used by Gidel (*Le Droit international public de la mer, le temps de paix*, vol. iii (1934), p. 594) to describe the *error* of supposing that the outer limits of territorial waters is drawn by following all the sinuosities of the coast-line. (For an absorbing exposition of the whole matter see Professor Waldock's article entitled 'The Anglo-Norwegian Fisheries Case', in this *Year Book*, 28 (1951), at pp. 132-7, from which much in this and the following footnotes is drawn.)

In any case, the *tracé parallèle* has nothing to do with the practicability of the *coastal* base-line following the shore, which can always be drawn whatever the sinuosities of the coast; while the 'arcs of circles' ('*courbe tangente*') method of drawing the *outer limit* of the belt (which is habitually used by mariners on all coasts, whatever their character) affords an easy method of tracing this limit, however rugged and broken the coast may be.

⁵ The 'skjaergaard' (literally 'rock rampart') is the name given to the fringe of islets, rocks and reefs extending along most of the length of the Norwegian coast. It was common ground in the case that these were to be regarded as an extension of the mainland.

⁶ There is of course no difficulty at all in following the sinuosities of the coast-line on the coast itself: the tide-mark is there for all to see and is continuous. The difficulty arose solely from the circumstance that the Court was not in fact discussing the tide-mark line along the coast, but the method of drawing the outer limit of the belt by a *tracé parallèle*—a method which is in fact never used. The difficulties completely disappear when the 'arcs of circles' ('*courbe tangente*') method is used. The Court stated (p. 129) that this method was 'not obligatory by law', and seems to have inferred from this that the tide-mark rule was therefore also not obligatory by law. In point of fact, the method of drawing the outer limit involved quite a different issue, having no direct bearing on the question of what was the proper line *on which to base* the belt. But the

contemplating so rugged a coast in detail. Such a coast, viewed as a whole, *calls for the application of a different method*. Nor can one characterize as exceptions to the rule the very many derogations which would be necessitated by such a rugged coast. The rule would disappear under the exceptions.' (Author's italics.)

From this it seems clear that the Court did not so much regard exceptional circumstances as justifying a departure from the normal rule, but rather as indicating that the normal rule was not of universal application. There is also some ground for thinking that the Court regarded the low-water-mark rule as being itself only a special application of a more general rule, of which the Norwegian base-line method was another application. Alternatively, the Court seems to have understood the low-water-mark rule in a special sense, as meaning not so much the *line* from which the breadth of the territorial belt was drawn, as the *points* along the coast between which this line was drawn.¹

(2) *Are there any conditions in which departure from an established and universal rule would be permissible on account of exceptional circumstances?* It is difficult to be dogmatic about such matters, but it could be said that if such a departure were ever permissible on this ground, the essential conditions of it would be (i) that the circumstances should be truly exceptional, and not merely unusual; and (ii) that no other method of meeting them would be possible except by a deviation from the normal rule. Neither of these conditions would have been satisfied in the Norwegian case, for as to (i) there are other coasts in the world similar to Norway's; and as to (ii) the low-water-mark rule is applied on these other coasts with complete ease and effectiveness. These facts confirm the view that the Court did not intend to set up exceptional circumstances as a generally valid ground for non-compliance with the law, but rather regarded the existence of the particular exceptional circumstances of Norway as evidence, or as indicating, either that the law was not what the United Kingdom Government had contended it to be, or else that this law was only of partial and not of universal application.

(b) '*Legitimate interests*'. In the *Fisheries* case, Norway strenuously argued in favour of a principle of 'legitimate interests', as justifying *per se* what was in effect exceptional or unusual action,² in the absence of any clear positive

existence and habitual use of the arcs of circles method of drawing the outer limit showed that there was in fact nothing impractical about the low-water mark as the base-line.

¹ Thus on a straight or nearly straight coast, a line drawn between points on the low-water-mark line would lie along that coast itself (or almost); whereas on a curved or indented coast a line between two points both on the low-water-mark line would depart more or less widely from the latter and would be a 'base-line' *à la norvégienne*. (These matters will be discussed in the next issue of this *Year Book* in connexion with the substantive question of the breadth of territorial waters.)

² This contention was admittedly put forward only with reference to the delimitation by a coastal State of its territorial waters, and in the light of Norway's particular thesis as to the rights of the coastal State in that matter. But the principle itself once admitted, it would obviously be capable of indefinite extension. Denying that any absolute or uniform rules existed on the subject

prohibition of such action under international law. The Court, while not excluding so-called legitimate interests as a factor to be taken into account in certain circumstances, can be regarded in the two passages quoted on p. 11 above as having rejected the idea that legitimate interests (that is to say, for all practical purposes the will of the State concerned) is *per se* a sufficient justification *if the matter is one which is in principle regulated by international law*, and even if the rules of international law on that matter lack complete precision.

(c) *Does lack of uniformity or precision in the rules of international law on a given topic justify action which is not in accordance with the general trend or weight of the rules, i.e. the 'norm'?* An affirmative answer to this question was apparently part of the Norwegian thesis in the *Fisheries* case, though it would perhaps be a fairer statement of Norway's position to say that she did not recognize that there was any definite general or preponderant trend or weight, in any given direction, of the rules of international law relative to the delimitation of coastal waters. It is at all events clear that the Court itself took the view that, if there was a traditional rule on this particular matter, it was subject to so many exceptions¹ that it could not be regarded as necessarily applicable in a case such as Norway's, considered to present special features. On the other hand, the two passages referred to in the immediately preceding sub-paragraph show conclusively that the Court certainly did not intend to propound the view that lack of precision or uniformity in the rules on a given topic took that topic out of the field of international law altogether and made it subject to action at the sole will and discretion of each individual State. However, it may be asked, if the rules on some topic lack precision and uniformity, but this is not enough

of territorial waters, Norway argued that the presumption was in favour of the right of the coastal State to delimit its territorial waters in accordance with what it regarded as its legitimate interests. Norway professed to admit that other maritime States equally had a legitimate interest in resisting undue encroachments on the area and use of the high seas, but contended that the onus lay on these other States to show that the coastal State was exceeding its 'legitimate interests' by its delimitation—thus setting up a purely subjective criterion, since there is and can be no precise definition of legitimate interests. As was pointed out in the United Kingdom argument, the law of coastal waters is essentially a compromise between the local interests of the coastal State, and the interests of other States in the free use and exploitation of the sea for all. This law provides a reasonably objective test of the point at which the one set of interests must be regarded as being displaced by the other. In the Norwegian attitude however, there was in practice very little sign of any compromise; for not only did the Norwegian argument deny the existence of any definite rules governing the matter, and place on the non-coastal States the onus of proving that the reasonable legitimate interests of the coastal State were being exceeded, but it made it virtually impossible for other States to discharge this onus by postulating that the interests of the coastal State must always be understood in the widest and most general sense.

¹ Commenting on this view, Professor Waldock, in this *Year Book*, 28 (1951), at p. 137, said: 'Thus perished the rule of the *low-water mark along the coast* which, it is no exaggeration to say, had behind it as much authority in state practice and in juristic opinion as any customary rule that has ever been canvassed before an international tribunal'. See also the article entitled 'The Anglo-Norwegian Fisheries Case', by Mr. D. H. N. Johnson in *International and Comparative Law Quarterly*, 1 (1951), Part 2, pp. 155-6.

to take that topic out of the field of regulation by law, then what rules can it remain subject to if not (at any rate in principle) those representing the general and preponderant trend or weight of the law on the subject? Without some such criterion, international law—most of the rules of which, in greater or lesser degree, lack complete precision and uniformity—would no longer be capable of practical application. In the *Fisheries* case, the Court was able to 'by-pass' this issue by propounding the existence of a sort of law behind the law, and it seems to have regarded the tide-mark rule as being itself only a special (if more common) case of a wider rule (the 'general direction of the coast' rule) of which the Norwegian base-line system was another special application. This seems to result from the following passages in the Judgment (*I.C.J.*, 1951):

- p. 133: '... certain basic considerations *inherent in the nature of the territorial sea*, bring to light certain criteria which . . . can be adapted to the diverse facts in question.' (Author's italics.)
- p. 129: 'The principle that the belt of territorial waters must follow the general direction of the coast makes it possible to fix certain criteria valid *for any delimitation of the territorial sea*'. (Author's italics.)
- p. 131: '... all that the Court can see [in the Norwegian system] is the application of general international law to a specific case.'

In short, the Court endeavoured to transcend, as it were, the supposed diversities of international practice¹ by propounding an overriding rule which would comprehend within itself and resolve all the various exceptions and special cases.²

(d) *The philosophy of the exception*

(1) It clearly cannot be a ground for denying the validity of the rules of international law on any given subject that these may admit of exceptions—for if it were, there would result the indefensible proposition that because there are exceptions to a rule, therefore there is no rule—or at any rate that there is only a *de facto* pattern of behaviour lacking obligatory character. Since the rules of international law in most—or at any rate in many—important fields are subject to exceptions and divergencies of practice and application, the whole foundations of international law would be undermined by such a doctrine, which is in any case at variance with the principle that exceptions or divergencies assume rather than deny the existence of a rule or norm. Yet such a doctrine was in effect put forward by Norway as part of her contention that the tide-mark rule could not be regarded as an

¹ These diversities in fact hardly exist as to the line *from* which territorial waters are to be drawn. All or nearly all the controversy has centred on the question of the breadth of the territorial belt, not its base-line, an enormous preponderance of international practice having adopted the low-water-mark along the shore as the natural and obvious base-line.

² The criterion of the general direction of the coast is of course itself open to widely ranging interpretations and to divergent practices.

accepted or at any rate as a binding rule of international law; while the Court itself, though, for reasons already indicated, probably not intending to endorse such a doctrine, made certain pronouncements which, if read in isolation, might be taken as suggesting that the existence of a few admitted exceptions to a rule, or deviations from it on the part of a few individual States, justifies the conclusion that the rule does not exist *as* a rule.

(2) It is necessary in the first place to distinguish the exception proper from the unilateral deviation or departure. Exceptions proper are part of the whole complex of the legal system that governs a particular topic. They are admitted and provided for by the law itself, and are of universal application in the sense that they come into play whenever and wherever the case they were intended to meet arises. For example, international law admits of and indeed provides for a number of cases in which, for different reasons, a diplomatic envoy need not be granted the customary immunities from suit and the like, and these form true exceptions to the general rule of the immunity of an envoy. But if some State refuses to grant a diplomatic envoy immunity in some case where the general rule requires it to be granted, no exception is thereby created. There is merely a unilateral departure from the rule. The point of the distinction for present purposes is that if there are a sufficient number of departures from the rule by a sufficient number of States, a stage might be reached when it might be said that the rule no longer existed, because it no longer represented an adequately general practice, or (if the departures were all in the same sense) that some new rule, supplanting or supplementing the old one, had come into existence.¹ But no number of cases bringing into play an exception (*stricto sensu*) to a rule could have this effect, or do more than indirectly confirm the existence of the rule.

(3) It is disappointing that in the *Fisheries* case, the type of instances cited by the Court as throwing doubt on the validity of the tide-mark rule, conceived as a general rule of law, did not consist of widespread departures from that rule by individual States:² they were simply exceptions (provided for by the law of territorial waters itself) to take account of the existence of special geographical features along a coast-line, such as bays, islands near the coast, and groups of islands. Thus, in the part of its Judgment rejecting the application of the tide-mark rule to Norway, the Court, after referring to the formulation of the low-water-mark rule by the relevant Sub-Committee of the 1930 Hague Codification Conference, proceeded as follows (*I.C.J.*, 1951, p. 129):

¹ This result will be the more readily admitted the nearer the position taken up is to pure positivism—but less readily by those who attach as much importance to the inherent character of a rule as to its observance in practice.

² Which could not have been the case, for most States did and do conform to the low-water-mark rule.

'But they were at the same time obliged to admit many exceptions relating to bays, islands near the coast, groups of islands.'

However, this Sub-Committee had formulated the rule as follows: 'Subject to the provisions regarding bays and islands, the breadth of the territorial sea is measured along the line of low-water mark along the entire coast', and it is therefore clear that the 'exceptions' were part of the rule, not extinctive of it. The explanation seems to be that the Court in this part of its Judgment was proceeding on the basis that the Norwegian coast in effect came under one or more of these exceptions—as being an extended series of bays, islands and groups of islands, and therefore itself constituted a special case to which some other rule than the tide-mark rule must be applied. In so far as the Court, in other parts of its judgment, rejected the tide-mark rule, not merely as applicable to Norway but as being a general rule of law at all, it did so on other grounds the nature of which have already been indicated. It would appear that the Court did not really reject the tide-mark rule as a rule of law, but regarded it as a special case of a more general rule, of which the Norwegian base-line system was simply another special application. The passage just cited from the Court's judgment may be compared with another in which the criterion adopted seems, as a criterion, to be unexceptionable (*I.C.J.*, 1951, p. 131):

'... the Court deems it necessary to point out that although the ten-mile rule [for bays] has been adopted by certain States . . . and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law.'

Here of course the point was not whether an admitted rule had ceased so to be, or was not applicable in certain circumstances, but whether it had ever been a rule at all. The principle involved is the same however, for the existence of exceptions proper to a rule cannot prevent the rule being a rule, since they are dependent on the rule itself and assume it.

(e) *Can a State escape the application to itself of a general rule of international law on the ground that it has never 'accepted' it, or has consistently regarded it as inapplicable?* Here again one would suppose the answer to be an obvious negative, since it does not normally lie with States to determine which of the rules of international law shall apply to them and which not. A State may deny that a given rule is an accepted rule of international law, or may contest the formulation of some rule as being incorrectly stated, but it cannot claim an exceptional or privileged position as regards any rules that *are* rules. The general rules of international law are *ipso facto* applicable to all States members of the international community, by virtue of their membership—so much so that they become, and are, automatically applicable to any new State received into that community, without any specific

acquiescence or act of acceptance by it. This being so, it is perhaps at first sight a little startling to find the Court saying in the *Fisheries* case (*I.C.J.*, 1951, p. 131):

'In any event the ten-mile rule [for bays¹] would appear to be inapplicable as against Norway inasmuch as she had always opposed any attempt to apply it to the Norwegian coast.'

This, it is true, comes immediately after a finding by the Court that 'the ten-mile rule has not acquired the authority of a general rule of international law'. Still, the implication is that even if it had, it would 'in any event' not be applicable as against Norway because of non-acceptance by her. The explanation seems to be that the Court was not intending here to enunciate any general principle of avoidance of the rules of international law by a process of non-acceptance, but was acceding to part of Norway's argument concerning her historic rights. This, known in the case as the 'negative aspect' of the historic rights contention, was conceded by the United Kingdom in the following sense: that if (i) at some time in the past Norway (or any other 'dissenting' State) had in fact, under international law as it then stood, enjoyed rights wider than those conferred by international law in its present form, and (ii) on the emergence of a new and more restrictive rule, had openly and consistently made known its dissent, at the time when the new rule came, or was in process of coming, into otherwise general acceptance, then the dissenting State could claim exemption from the rule even though it was binding on the community generally and had become a general rule of international law.² Failing this, the 'dissenting' State must be held to have accepted the new rule, and to have become bound by it—and if it then wished to show that it was *no longer* bound, this could only be on the basis of a subsequently acquired historic or prescriptive right by which it had built up an exemption from the formerly binding rule (this being the 'positive' aspect of historic rights). The United Kingdom, while conceding the principle of the 'negative' argument, denied either that Norway had ever had wider rights than the modern rules of international law conferred, or if she had, that she ever made known her dissent from those rules when they first came into operation, and argued that on the contrary Norway had in fact accepted them.³

¹ I.e. that in the case of bays not exceeding ten miles in width at the mouth (or at that point in the bay where its width did not exceed that distance) a base-line could be drawn from which territorial waters would be measured.

² There is no inconsistency between this and the principle of the inter-temporal law (see § 2 above), but simply an exemption from its operation if the State concerned proclaimed its non-acceptance of the new rule in due time, and maintained that attitude consistently.

³ It followed, if the United Kingdom view was correct, that Norway's historic right to the benefit of a different rule could only be a *prescriptive* one, i.e. it was a subsequent *departure* from a rule that had come to bind her—but a departure acquiesced in by the other States and continued over a considerable period. This, the 'positive' aspect of historic rights, is discussed in the

The effect of the Court's finding in the above-quoted passage is therefore an acceptance of the Norwegian contention that Norway had always dissented from certain rules *even at their inception*, and had therefore acquired an exemption from them. The essence of the matter is dissent from the rule *while it is in process of becoming one, and before it has crystallized into a definite and generally accepted rule of law*. The Court's finding is not therefore to the effect that a State can at any time exempt itself from an *established* rule by opposing the application to itself of that rule.

(f) *The true sense in which the consent of States to a rule of international law is necessary*. It is clear that Norway attempted to invoke the consensual basis of international law as a ground for the non-application of a given rule to a State refusing to accept it. The general consent of States may be a source of rules of international law, and such consent may be necessary before a rule can be said to be accepted as such.¹ But this is not to say that States subject to international law can 'contract out' of its rules, so to speak, by purporting to revoke their consent. Consent can indeed be *withheld*, but this can only be in the formative period, when general consent is still necessary to the validity of the rule. That is why dissent must be expressed at that stage in order to confer exemption: otherwise it is too late.

§ 5. SUPREMACY OF INTERNATIONAL LAW OVER MUNICIPAL LAW²

This principle, in the sense that the provisions of its municipal law cannot alone justify a State in its international actions, if these are not also in accordance with international law, was affirmed by the Court in the passage already cited from the *Fisheries* case (see p. 11 above)—where it said (*I.C.J.*, 1951, p. 132) that the delimitation of sea areas always had an international aspect and could not be dependent 'merely upon the will of the coastal State as expressed in its municipal law'. A more explicit affirmation of this principle was contained in Judge McNair's opinion in the same case (*ibid.*, p. 181):

'It is a well-established rule that a State can never plead a provision of, or a lack of a provision in,³ its internal law or an act or omission of its executive power as a defence

next following section. The essential feature of it is the acquiescence of other States—whereas such acquiescence is immaterial to the acquisition of historic rights in their 'negative' aspect.

¹ There are philosophical implications in this which cannot be discussed here; but Professor Lauterpacht ('Sovereignty over Submarine Areas', in this *Year Book*, 27 (1950), p. 395) has referred to 'the mysterious phenomenon of customary law which is deemed to be a source of law only on condition that it is in accordance with law'.

² And see this *Year Book*, 27 (1950), p. 12, § 10.

³ Both pleas were put forward in the *Nottebohm* case (Jurisdiction), in which Guatemala argued that her law did not permit the Guatemalan Government to participate in *compulsory* proceedings before the Court if any part of these took place after the period of Guatemala's acceptance of the Court's compulsory jurisdiction had run out, even though they had begun while this period was still current; and that Guatemalan law lacked the necessary provisions which would enable the Government to arrange for Guatemalan participation in the circumstances. In rejecting the main

to a charge that it has violated international law. This was decided as long ago as in the Geneva Arbitration of 1870-1871 on the subject of the *Alabama claims*, . . .¹

Similarly, Judge Alvarez in the same case said (p. 152):

'International law takes precedence over municipal law. Acts committed by a State which violate international law involve the responsibility of that State.'

§ 6. HISTORIC RIGHTS. PRESCRIPTION

Although in the *Fisheries* case this issue arose with reference to claims to coastal waters, it is capable of arising in many different connexions, and accordingly involves questions of general principle. In the *Fisheries* case, it was part of the Norwegian argument that even if the general rules of international law did not allow Norway to delimit her waters in the manner provided by her legislation, she had a historic right to do so by virtue of a long and consistent past practice. It should be explained, however, that the Norwegian claim was not to historic *waters* as such, for the waters in dispute (those from Traena in northern Norway to the Varanger fjord on the Russian boundary) were not either delimited or *expressly* claimed until 1935. Norway's claim was rather to a historic right to delimit her waters at will in a certain *manner*—by the application of what was styled the Norwegian 'system'. It was solely this aspect of the matter that was dealt with by the Court.² It should also be noticed that since the Court had already found that the general rules of international law, as laid down by the Court, did in themselves justify the Norwegian delimitation, it was strictly unnecessary for it to go into the issue of historic rights. Nevertheless, the Court did so, and found in favour of Norway on that question also. There was, however, an important difference between the doctrine of historic rights as put forward by Norway and as found by the Court.

(a) *Necessity for acquiescence on the part of other States*

(1) *The general principle.* The Norwegian contention was essentially an attempt to remove from the conception of the 'historicity' of given rights

contention, and holding that Guatemala's acceptance of the Court's compulsory jurisdiction applied to any proceedings regularly begun while the acceptance was in force and which otherwise complied with its terms—(this question will be considered in a later article)—the Court did not pronounce on the question of the relevance of domestic law. Instead, the Court suggested that its finding that Guatemala was bound to submit to the jurisdiction of the Court would fulfil the requirements of Guatemalan law, and enable the latter to operate so as to permit of Guatemalan participation even according to the provisions of that law.

¹ In the *Alabama* case, Great Britain had pleaded, *inter alia*, that under the applicable provisions of English law, as they then stood, the authorities lacked the necessary power to prevent the *Alabama* sailing from a British port, even if an intention to take service as a commerce raider on behalf of the Confederate side in the American Civil War was suspected; but this deficiency was not held to absolve the British authorities from responsibility to the United States Government for what amounted to a breach of Great Britain's duties as a neutral. It was this case that led to English law being remedied by the passing of the Foreign Enlistment Act, 1870.

² The distinction emerges clearly from the opinion of Judge Read (*I.C.J.*, 1951, pp. 194-7).

the element of *prescription*, that is, in effect, the element of an *adverse* acquisition of rights in the face of existing law. Yet this element is of the essence of the matter, for a title or right based on historic considerations only becomes material when (and indeed assumes that) the actions involved are not or could not be justified according to the recognized rules, and can therefore be justified, if at all, only by reference to some special factor such as a historic right. As was suggested in the United Kingdom's written reply in the *Fisheries* case, this right takes the form essentially of a 'validation in the international legal order of a usage which is intrinsically invalid, by the continuance of the usage over a long period of time'. Being reluctant to admit that the delimitation of her waters could involve a departure from, or be contrary to the normal and accepted rules of, maritime law, Norway put forward a theory of historic rights according to which a long continued practice on the part of a State does not so much confer a right which would otherwise not exist, as confirm its pre-existence: in short, according to this view, the long continuance of the practice is not constitutive of the right, but evidence of it. On that basis, it is clear that the consent or acquiescence of other States would not so much be unnecessary as irrelevant—and so Norway argued. There was, however, also in the Norwegian argument a tendency to contend that even if the practice were constitutive of the right, the consent of other States was unnecessary, because a practice sufficiently long and consistently followed, even in the face of *opposition* by other States, ended by conferring rights, whether these States acquiesced or not.¹ There are actually three senses in which this proposition might be, or might appear to be, true; but it is important to note the exact nature and limits of each.

(i) *Necessity for protests to be effective in character*. It is true that an opposition, even if persistently maintained, may end by losing all legal force because of its insufficient character. In short, protests, in order to preserve

¹ Norway also sought to maintain that the fact that historic claims always related to cases where some special feature—geographic, economic or other—was involved, showed that it was the existence of such factors, not the acquiescence of other States, that gave rise to the special right. But the United Kingdom pointed out that the existence of these peculiar features merely accounted for the willingness of other States to acquiesce: this willingness would obviously not exist in a case which did not in some way depart from the ordinary. But the special right still had its legal foundation in this acquiescence, not in the mere existence of the peculiar features that had inspired the latter.

The Norwegian position in fact came very near to the assertion of a right of *occupation* of parts of the high seas in the general vicinity of a country's coasts, on the same sort of basis as the occupation of unowned territory (for which of course—if the territory is *res nullius*—no consent on the part of other States is necessary). But in fact the high seas are not *res nullius* in which no State has any rights until they are acquired by occupation, but *res communis* in which all States have certain rights. An exclusive right to waters which would otherwise, in law, be high seas, can only be acquired by *prescription*, i.e. by a consistent assertion of jurisdiction over them acquiesced in, expressly or presumptively, by other States in such a way as to amount, in effect, to an *abandonment*, actual or constructive, of the communal rights in those waters they would otherwise have retained.

(or rather to go on preserving) the rights of the protesting State, and prevent the acquisition of a prescriptive right by the acquiring State, must be effective. Put in another way, this means that diplomatic protests will not indefinitely preserve rights¹ or prevent the process of prescription unless they constitute the sole lawful means in the circumstances by which the State concerned can act, and can endeavour to keep its position intact.² If, however, other means are available, e.g. a proposal for reference to international adjudication, or taking the matter before some competent international organization, a mere continuance of diplomatic (i.e. paper) protests will not serve indefinitely to keep the position open.³ It comes to this, that reliance on routine protests, when means are available *which, if used, would or might bring the matter to an issue*, can in the end be construed as a constructive abandonment by the State of its rights—a tacit acquiescence in the situation, debarring it, as has been said (United Kingdom Written Reply in the *Fisheries* case), 'from further questioning what has become part of the established legal order'. However, all this still means no more than that acquiescence will, in fact, be *presumed* in certain circumstances, despite a formal attitude of protest—not that acquiescence can be dispensed with.

(ii) *The theory of historic rights comes into play mainly where an absence of express consent by States might otherwise lead to an inference of opposition.* It is obvious that where a State has *expressly* consented to a departure by another State from the normal rules of international law, or to the exercise by it of special rights, there is no need to invoke any doctrine of historic rights, at any rate as against that State. The same is true where, without expressly consenting, a State has so conducted itself that its consent can clearly be inferred in a positive sense from its actions or attitude: again the claim can be founded on this consent, irrespective of any historic element. Where, however, other States have neither consented expressly, nor, by their conduct, actively implied their consent, but have simply been *inactive*, only the historic element in a claim can supply the necessary presumption of (tacit) acquiescence arising out of the fact that the practice in question has continued for a long time without encountering active opposition (if such be the case). Thus, as was pointed out in the United

¹ Clearly, protests must initially have this effect and continue to do so for some time—in fact for a reasonably long period. What this will be must depend on the circumstances.

² Again, due regard must be had to the circumstances in applying this principle, and at least some regard to the practical aspect. For instance, it might be open to a State to follow up its protests by action which, though strictly lawful, might be regarded as unduly provocative, e.g. the giving of armed protection to its merchant vessels or civil aircraft under certain conditions. Again, the habitual rejection on principle by certain States of all reference to international adjudication, or the near-certainty of a 'veto' if the matter were brought before an international organization, might sufficiently account for not going beyond a protest.

³ Of course, once arbitration or judicial settlement has been proposed, *and rejected*, or *not taken up by the acquiring State*, continued protest, even if only diplomatic, will retain all its preventive force.

Kingdom argument in the *Fisheries* case, the true role of the theory is to compensate for the lack of any evidence of express or active consent by States, by creating a presumption of acquiescence arising from the facts of the case and from the inaction and toleration of States. But of course it is still this presumed acquiescence, not the usage *per se*, which creates the right. Moreover, the historic element only creates a *presumption* of acquiescence. It remains open to any State against which the claim is invoked to rebut this presumption if it can, and to show that in all the circumstances it cannot be held to have consented.¹

(iii) *Historic claims to non-exclusive rights.* There may be cases where, because the right in question is claimed on a *non-exclusive* basis, the acquiescence, express or tacit, of other States need not be shown, and the fact of the historic exercise of the right suffices *per se*. For instance, a State whose nationals had fished certain waters as part of the high seas from time immemorial might, on a historic basis, assert the right to continue to do so, despite the fact that the waters concerned were now claimed as part of the territorial or national waters of another State, and this claim was admitted. Since all States have a right to fish in waters that are high seas, it would not be necessary to prove consent or acquiescence in the fishing by other States, but merely the fact of it.

(2) *The time factor.* If the view suggested in paragraph (1) (ii) above is correct, the passage of an appreciable period of time is necessary for the acquisition or formation of historic rights, because if the essential role of the historic element is to supply an inference of acquiescence on the part of other States, arising from their inactivity coupled with the passage of time—then time must be allowed to pass. In the *Fisheries* case, however, Judge Alvarez said (*I.C.J.*, 1951, p. 152):

'International law does not lay down any specific duration of time necessary for prescription to have effect. A comparatively recent usage . . . may be of greater effect than an ancient usage insufficiently proved.'

¹ It must also be remembered that some eminent authorities have expressed doubt whether the toleration or inaction of other States can ever operate to validate certain acts intrinsically illegal. Thus Professor Lauterpacht ('Sovereignty over Submarine Areas', in this *Year Book* 27 (1950), at pp. 397-8) has said:

'On the other hand, it is probably true to say that the absence of protest is irrelevant if the action of the state claiming to acquire title is . . . so patently at variance with general international law as to render it wholly incapable of becoming the source of a legal right. . . . In such cases a protest may be advisable; it is not essential.'

Continuing, Professor Lauterpacht says with reference to the very question of maritime rights:

'Thus, for instance, if a state were to proclaim an exclusive right of navigation, jurisdiction or exploitation on what is regarded by the generality of states as part of the high seas, the absence of protest would hardly make any difference to the legal position—in the same way as the manifest illegality of any other action would preclude it from becoming a valid basis for precedent. *Ab injuria jus non oritur*. There are acts which are so tainted with nullity *ab initio* that no mere negligence of the interested state will cure it.'

In support, Professor Lauterpacht cites Guggenheim in *Hague Recueil*, 74 (1949) (i), pp. 195-263.

If the emphasis is placed on the words 'comparatively' and 'insufficiently proved', this pronouncement is fully acceptable, but it is even so more applicable to the case of the formation by usage of a new general rule of customary international law than to the acquisition of specific and special rights by an individual State on a prescriptive basis. Professor Lauterpacht has recognized this distinction in the following passage:¹

'However, assuming . . . that the emergence of the doctrine of sovereignty over the adjacent areas constituted a radical change in pre-existing international law, the length of time within which the customary rule of international law comes to fruition is irrelevant.² For customary international law is not yet another expression for prescription.³ A "consistent or uniform usage practiced by the States in question"—to use the language of the International Court of Justice in the *Asylum* case [*I.C.J.*, 1950, p. 276]—can be packed within a short space of years. The "evidence of a general practice as law"—in the words of Article 38 of the Statute—need not be spread over decades. Any tendency to exact a prolonged period for the crystallization of custom must be proportionate to the degree and the intensity of the change that it purports, or is asserted, to effect.'

A new rule of customary law based on the practice of States can in fact emerge very quickly, and even almost suddenly, if new circumstances have arisen that imperatively call for legal regulation—though the time factor is never wholly irrelevant: but the acquisition of prescriptive rights by individual States, contrary to the existing (and otherwise still subsisting) international order, involves different considerations and criteria,⁴ that make the passage of time, and of an appreciable period of time at that, essential at any rate in all those cases (which are the type of the true prescriptive or historic claim) where the positive consent or express recognition of States cannot be shown.

(3) *Identity of the recognizing or acquiescing States.* It is obvious that, depending on the circumstances, the acquiescence of certain States must be of far greater weight and moment in establishing the existence of a prescriptive or historic right than that of others. Thus the consent, either expressly given or reasonably to be inferred, of those States which, whether on account of geographical proximity, or commercial or other interest in the subject-matter, &c., are directly affected by the claim, may be almost enough in itself to legitimize it; while a clear absence of consent on the part of such States would certainly suffice to prevent the establishment of the

¹ 'Sovereignty over Submarine Areas', in this *Year Book*, 27 (1950), at p. 393.

² Or perhaps not so much irrelevant as *not* determinant *per se*.

³ This is obviously correct, but the two have important features in common. Both depend on the establishment of a practice or usage—one general and the other particular—and each derives its eventual legal sanction from some form of consent on the part of States—either general acceptance in the one case, and in the other specific recognition or tacit acquiescence. Apart from any difference in the time factor, the *method* (practice and assent) is the same both for the establishment of new customary law and for the acquisition of prescriptive or historic rights.

⁴ Different, that is, as regards the time factor: see the preceding footnote.

right. Equally, acquiescence or refusal on the part of States whose interest in the matter, actual or potential, is non-existent, or only slight, may have little practical significance. Professor Lauterpacht (*loc. cit.*, p. 394) has referred to this point also, in regard to the evolution of customary law—and the position is in principle no different with respect to the acquisition of prescriptive or historic rights:

‘Moreover, assuming that we are confronted here with the creation of new international law by custom, what matters is not so much the number of states participating in its creation . . . as the relative importance, in any particular sphere, of [the] states inaugurating the change.’

The Court did not directly pronounce on this point in the *Fisheries* case, but it did implicitly take account of it in making the United Kingdom’s position as a principal maritime Power having a direct interest in the North Sea area and its fisheries a ground for imputing knowledge of and acquiescence in Norway’s special claims. Thus the Court (*I.C.J.*, 1951, p. 139) referred to the position of the United Kingdom

‘. . . As a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, . . .’

and again (*ibid.*):

‘. . . Great Britain’s position in the North Sea, her own interest in the question, . . .’

(b) *The attitude of the Court*

(1) *The consent of other States necessary.* While finding in favour of Norway that other States—and in particular the United Kingdom—must be held to have acquiesced in the Norwegian system of delimitation, the Court did not adopt the Norwegian theory of the absolute and conclusive character, as against all the world, of a long-continued national usage *per se*. It considered the acquiescence, the consent in some form, or at least the toleration, of other States, to be necessary. This is apparent from such passages as the following (*I.C.J.*, 1951, pp. 136–7):

‘The Court, having thus established the existence and the constituent elements of the Norwegian system of delimitation, further finds that this system was consistently applied by Norwegian authorities and that it encountered no opposition on the part of other States.’

and again (p. 138):

‘From the standpoint of international law, it is now necessary to consider whether the application of the Norwegian system encountered any opposition from foreign States.’

Similarly (*ibid.*):

‘The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact.’

and (at p. 139):

'The notoriety of the facts, the general toleration of the international community, . . . would in any case warrant Norway's enforcement of her system. . . .

'The Court is thus led to conclude that the method . . . established in the Norwegian system . . . had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law.'

The Judges delivering separate or dissenting Opinions took a like view on this point. Thus Judge Hsu Mo (*ibid.*, p. 154) referred to Norway's 'consistent past practice which is acquiesced in by the international community as a whole'. Judge Read (p. 194) said:

'If it can be shown that the Norwegian System has been recognized by the international community, it follows that it has become the doctrine of international law applicable to Norway, either as special or as regional law.'

Later (at p. 195) he spoke of a Norwegian system

' . . . applicable or applied to the coast in question; known to the world; and acquiesced in by the international community.'

(2) *The criterion of 'absence of opposition'*. It will be seen that in these passages the Court (in contradistinction to the more positive criteria of the minority Judges) set up the test of absence of opposition by other States. How far is this test conclusive? Clearly, absence of opposition is relevant only in so far as it implies consent, acquiescence or toleration on the part of the States concerned; but absence of opposition *per se* will not necessarily or always imply this. It depends on whether the circumstances are such that opposition is called for because the absence of it will cause consent or acquiescence to be presumed. The circumstances are not invariably of this character, particularly for instance where the practice or usage concerned has not been brought to the knowledge of other States, or at all events lacks the notoriety from which such knowledge might be presumed: or again, if the practice or usage concerned takes a form such that it is not reasonably possible for other States to infer what its true character is. These proved to be the crucial points on the historic aspects of the Norwegian case.

(c) *What constitutes 'knowledge'?*

(1) *The traditional law*. The point here involved (the existence of knowledge such that inaction leads to an inference of acquiescence) is not peculiar to claims to historic rights: it is a cardinal question material to every dispute where the issue is whether the rights of a given State must be deemed to have been forfeited or impaired by inaction on its part, failure to protest, and so on. Did the State know what was going on, could it or should it have known, and if it did know, what exactly was it that it knew, and what inference should it have drawn, and could it

reasonably have drawn some other inference? These are some of the questions liable to arise. To these questions the Court's findings in the *Fisheries* case provide both an answer and a warning. To review and attempt to assess the value of the evidence in that case¹ would exceed the scope and purpose of the present discussion, which aims at elucidating general principles on the basis of the Court's findings. Adhering to that object, it can perhaps be said that two principles have usually been very generally accepted on the question of knowledge and tacit acquiescence:

- i. that Governments could not be held to have *official* knowledge of the laws and decrees of another country unless these were either officially communicated to the Government concerned, or else brought to its knowledge in some unmistakable way, e.g. by reason of some public incident involving a national of that Government in which the legislation in question was a factor, or because this legislation was cited or came up for discussion at some international conference attended by the Government concerned: a Government might *in fact*, by report or otherwise, be *aware* of such legislation, but this would not be knowledge in the formal sense of the term;²
- ii. that Governments were, at any rate up to a point, entitled to rely for the protection of their positions and interests on the simple existence of the generally accepted rules of international law—thus the position of a Government would not be prejudiced by its not immediately protesting if some other Government made a declaration or promulgated

¹ There was no point on which the contentions of the parties and the views of the Court and of the dissenting Judges (who, on certain aspects of this matter, included Judge Hsu mo) differed more diametrically, particularly as to the significance to be attributed to the facts.

² It is obviously necessary to apply this doctrine in a reasonable and realistic way. A Government can probably be held to have official knowledge through its diplomatic and consular representatives in a country of *public* events of importance taking place there, or of known local conditions. Thus in the *Minquiers* case the United Kingdom Government maintained that the French Government must, through its consular representative in Jersey, have been aware of certain events and conditions relating to the Minquiers and the Ecréhous islets and rocks. On the other hand, a Government cannot, merely through the reports (neither necessarily complete nor continuous) of its official representatives, be held to have formal knowledge of technical matters such as the law of the country, the bearing and effect of legislation, &c., which require elucidation and interpretation by experts, and primarily experts of the country concerned.

The position in the *Minquiers* case was fundamentally different from the Norwegian. The close proximity of the disputed islets to French territory made it virtually impossible that the French authorities should be unaware of what was going on there: and if they were, that very fact militated against France's claim to be the sovereign. Judge Levi Carneiro made this point in his separate but concurring Opinion (*I.C.J.*, 1953, p. 106):

'... Failure to exercise such surveillance and ignorance of what was going on on the islets indicate that France was not exercising sovereignty in that area.'

This brings out the essential difference between the two cases. In the *Fisheries* case the United Kingdom was not itself claiming sovereignty over the disputed waters, but merely contesting Norway's claim. In the *Minquiers* case both sides claimed sovereignty, and lack of knowledge of events in the islets was therefore *per se* adverse to the claim; whereas in the *Fisheries* case lack of knowledge on the part of the United Kingdom would have been helpful to its case and adverse to Norway's.

legislation believed to be contrary to international law.¹ Only if some incident arose, e.g. out of an attempt to apply or enforce the legislation against other States or their nationals, could a failure on the part of the States concerned to react be said to imply acquiescence on their part.²

On the basis of these principles, it could be said that neither knowledge nor acquiescence would be presumed except from circumstances in which it could *unmistakably* (or at the least with a high degree of probability) be inferred. In short, what was required was something amounting to *recognition* of the practice in question on the part of other States. The Court's decision in the *Fisheries* case, however, raises doubts as to how far these principles are still valid, for in that case the Court ascribed to the United

¹ Municipal legislation or declarations not in accordance with international law produce no effect at all on the international plane. They are *prima facie* null and void, and there is strictly nothing to protest about until it is attempted to apply or enforce the legislation in a manner producing international effects. Only express and positive acceptance by other States could give such legislation any international validity. Mere failure to protest or react could not do so, unless, after the lapse of a long period, it could be said that the legislating State had established a consistent usage the existence of which was well known to other States, whose acquiescence could be presumed from their knowledge coupled with their failure to protest or otherwise react—in short, that a historic right had been established.

² A clear statement of these principles is given in the following passage from the article by Professor Waldock already cited (this *Year Book*, 28 (1951), at p. 165):

'... It is interesting to compare the Court's interpretation of the United Kingdom's failure to react to the 1869 and 1889 Decrees with declarations by the United States and France respectively concerning the extent to which they considered themselves affected by a claim in municipal legislation. In 1863, Secretary Seward, speaking of the Spanish claim to a six-mile maritime belt off Cuba, said:

"A claim thus asserted and urged must necessarily be now respected and conceded by the United States, if it could be shown that on its being brought to their notice they had acquiesced in it, or that on its being brought to the notice of other Powers it had been so widely conceded by them as to imply a general recognition of it by the maritime Powers of the world. *It is just here, however, that the claim of Spain seems to need support. Nations do not equally study each other's statute books, and are not chargeable with notice of national pretensions resting upon foreign legislation.*"

In 1951, France in a Note concerning recent Latin-American claims said:

"*Le Gouvernement français n'a jamais reçu, par la voie diplomatique, notification des résolutions ou propositions adoptées, de 1945 à 1950, par le Mexique, le Chili, le Pérou, Costa-Rica et le Salvador, ayant pour effet de changer la limite de leurs eaux territoriales. Il n'a donc pas eu, dans ces cas précis, à formuler un avis.*

"Aucun État ne peut, par une déclaration unilatérale, étendre sa souveraineté sur la haute mer et rendre cette annexion opposable aux pays qui ont le droit d'invoquer le principe de la liberté des mers, tant que ces derniers ne l'auront pas formellement acceptés. *Une renonciation à une règle de Droit International établie dans l'intérêt de la communauté des nations ne peut pas se présumer.*

"Telle pourrait être la position que le Gouvernement français soutiendrait si un quelconque pays lui notifiait officiellement sa résolution d'étendre la limite de ses eaux territoriales. *Cette position n'a aucun caractère confidentiel puisqu'elle est fondée sur des principes universellement reconnus de Droit International.*"

One of these statements was almost contemporaneous with the promulgation of the 1869 Decree; the other was made a few months before the Court gave judgment.'

Kingdom both knowledge of, and acquiescence in, a general Norwegian *system* of base-lines applicable to all Norwegian waters, despite the following considerations:

- a. The Norwegian Decrees on which the 'historic' claim mainly rested—those of 1869 and 1889—were not at the time officially communicated to the United Kingdom (or, so far as is known, to any) Government. This did not occur until much later (after 1905), in reply to inquiries, though some Governments had before then become aware of the Decrees.
- b. These Decrees only related to particular areas of the Norwegian coast (off Sunnmøre and Romsdal) totalling less than 100 miles out of a total coastal mileage for Norway of something like 1,500. When, in 1908, the 1889 Decree was communicated to the United Kingdom it was accompanied by a statement describing it simply as relating to a 'certain part of the coast'.
- c. These Decrees *appeared* to be based on special factors relating to the geographical and other conditions of the areas affected. The Decrees themselves laid down no *general* base-line 'system'. Such a general system was postulated in an *Exposé des Motifs* accompanying the Decrees, but this *Exposé* was not published until a 'Report' of 1912, when a dispute between Norway and the United Kingdom had already arisen. (Even the 1935 Decree, which was the Decree in issue in the actual dispute before the Court, only applied to northern Norway from Traena to the Varanger fjord—a distance of less than one-third of Norway's total coastal mileage.) The 1912 Report was communicated 'unofficially' to the United Kingdom Government at the time—see the Norwegian Note of 29 November 1913 (*Norwegian Counter Memorial*, Annex 35, No. 4)—and was also referred to in this Note. But there was room for considerable doubt whether either the Report or this Note were at all explicit as to the existence of any general Norwegian system or could invest the United Kingdom with knowledge of it.¹

¹ Judge Read, for instance, thought not. He said (*I.C.J.*, 1951, p. 202):

'Accordingly, the question arises: whether this communication of the 1912 Report was notice to the British Government of the existence of the Norwegian System; and, if so, whether there was acquiescence by that Government, so as to enable the claims constituting that System to ripen into rules of customary international law.

'Here, without going into the question whether the Report was an adequate warning of the existence of the System, I shall consider whether the failure of the British Government to make specific protests on receipt of the 1912 Report and of the Norwegian Note of November 29th, 1913, can be regarded as acceptance of the Norwegian claims.'

After pointing out that, at the time, negotiations between Norway and the United Kingdom were going on for a fishery *modus vivendi* in which the United Kingdom Government had expressly reserved the principle of the three-mile limit 'from low-water mark', Judge Read proceeded:

'The 1912 Report was transmitted and adopted by the Norwegian Foreign Ministry as a

- d. Such official statements and indications of Norway's attitude about the territorial waters as were given to, or resulted from interchanges with, the United Kingdom Government during the relevant period (*circa* 1869-1912), appeared to be to the effect that the *general* basis for drawing Norwegian waters was the tide-mark rule.¹
- e. There was a great deal of evidence in the case to show that, so far from attempting to make her 'system' known or to obtain the agreement of other Governments, Norway had proceeded with great hesitation, had been very reluctant to court publicity, and that information concerning her system and fishery limits had been very difficult to obtain.²

statement of the principles of international law supporting the Norwegian position. This was done, however, in the course of negotiations for the establishment of a *modus vivendi*. By its very nature, a *modus vivendi* implies the reservation and preservation of the legal positions of both Parties to the controversy. If nothing had been said, it would have been necessary to imply an intention of both Parties to admit nothing and to maintain their legal positions intact. In this case, however, the negotiations proceeded on the basis of an express stipulation to leave "the question of principle intact".

¹ For instance, in April 1882, Sir Horace Rumbold, British Chargé d'Affaires in Christiania, was informed by the Norwegian authorities (see Annex 31, No. 1, to the *Norwegian Counter-Memorial*, and the United Kingdom *Oral Reply: I.C.J., Pleadings, Oral Arguments, Documents*, vol. IV, pp. 441-2) as follows:

'... la Norvège réclamait la souveraineté sur un espace de 4 milles, à compter de la laisse de basse mer sur toutes ses côtes'.

The Norwegian Government were reminded of this in 1906 (see *ibid.* and United Kingdom *Argument*, pp. 446-7), and did not dispute it as a correct description of their general position. It is worth noticing the explanation of this put forward on behalf of Norway in the course of the case, namely, that such statements merely related to the difference between high- and low-water-mark and only meant that Norway measured from the low as opposed to the high-water-mark (i.e. in effect drew her base-lines from *points* on the low-water-mark), and in no way implied that the base-line was the whole low-water-mark along the coast. It may also be noticed that in replying to a French inquiry in 1908, no indication of any general base-line system was given. On the contrary, it was stated (see Annex 34, No. 2, of the *Norwegian Counter-Memorial: I.C.J., Pleadings, &c.*, vol. II) that:

'... En interprétant les prescriptions norvégiennes dans cette matière... ce ministère s'est exprimé dans ce sens que la distance à partir de la côte doit être comptée de la ligne de la basse marée, et que chaque îlot qui n'est pas continuellement submergé... doit être compris comme point de départ.' (Author's italics.)

Does the meaning of this seriously admit of any doubt?

² See the United Kingdom *Written Reply*, paragraph 426 (*I.C.J., Proceedings*, vol. II, pp. 601-2). Anyone who reads Sir Eric Beckett's oral argument on behalf of the United Kingdom (at pp. 439-54 of Vol. IV of the published proceedings) can hardly fail to be struck by the volume of evidence (only partially cited there—see generally United Kingdom written pleadings) showing (a) that the Norwegian authorities were well aware that their system was not in accordance with traditional usage or general practice; (b) that they felt considerable doubt as to the likelihood of it being accepted by other countries; (c) that they avoided rather than sought attracting attention to the matter; and (d) that in fact the system was little known, either to Governments or to legal institutions outside Scandinavia. It is worth noticing Judge McNair's views on this point, as he did not think that the United Kingdom either knew of any general Norwegian 'system' or knew that it even existed until about 1933. After quoting certain views of the well-known Norwegian jurist Raestad in connexion with the case of the arrest of the *Deutschland* in Norwegian waters in 1926, he proceeded (*I.C.J.*, 1951, pp. 182-3):

'It does not greatly matter whether Dr. Raestad's views are right or wrong. What is important

f. During the period of incubation of Norway's historic claim (i.e. roughly 1869-1912)¹ no incident occurred, such as the arrest of a

from the point of view of the notoriety of the Norwegian system of straight base-lines, is that, in the year 1926, a lawyer of his standing and possessing his knowledge of the law governing Norwegian territorial waters should envisage the possible alternative methods of drawing base-lines, for the Norwegian contention is that the United Kingdom must for a long time past have been aware of the Norwegian system of straight base-lines connecting the outermost points on mainland, islands and rocks, and had acquiesced in it.

'Between 1908 and the publication of the Decree of 1935, the United Kingdom repeatedly asked the Norwegian Government to supply them with information as to their fishery limits in northern Norway; see the Report of the Foreign Affairs Committee of the Storting dated June 24th, 1935 (Memorial, Annex 15), which states that "The British Government have repeatedly requested that the exact limit of this part of the coast should be fixed so that it might be communicated to the trawler organizations." The Norwegian reply to these requests has been that the matter was still under consideration by a Commission or in some other way, e.g., in the letter of August 11th, 1931, from the Norwegian Ministry of Foreign Affairs, "the position is that the Storting have not yet taken up a standpoint with regard to the final marking of these lines in all details".'

'The impression that I have formed is that what in the argument of this case has been called "the Norwegian system" was in gestation from 1911 onwards, that the *St. Just* decision of 1934 (overruling the *Deutschland* decision) marks its first public enunciation as a system applicable to the whole coast, and that the Decree of 1935 is its first concrete application by the Government upon a large scale. I find it impossible to believe that it was in existence as a system at the time of the *Deutschland* decision of 1926.'

Equally, Judge Read thought that even as late as 1931 there was before the United Kingdom Government no adequate evidence of any general Norwegian 'system'. He said (*ibid.*, pp. 195-6):

'In 1930-1931, the diplomatic correspondence between Sir Charles Wingfield and Mr. Esmarch, arising out of the seizure of the *Lord Weir*, strongly confirms this position. It is not contradicted by any evidence produced in the record. The statement made by Sir Charles Wingfield was questioned by the Norwegian Agent, who did not produce any evidence to the contrary. The statement was that the ground relied upon to justify the seizure of the *Lord Weir* was "that on the night of 15th September she had fished at a spot 3.6 nautical miles outside the line Haabrandnesset-Klubbespiret: i.e. more than 4 nautical miles from the nearest land". The Norwegian Agent had access to the Court records in Norway. The diplomatic correspondence was set forth in the Memorial, Annex 10. He had four opportunities to produce contradictory evidence: in the Counter-Memorial, in the Rejoinder and at the two stages of the oral proceedings. He did not choose to do so and in the circumstances I am compelled to accept Sir Charles Wingfield's statement. It proves: (1) that, in 1930-1931, the Norwegian judicial and police authorities were measuring territorial waters from the Haabrandnesset-Klubbespiret base-line (the same closing lines of Syltefjord as were subsequently adopted in the Reply at p. 248); (2) that, in 1930-1931, Norway was not applying the Norwegian System to the East Finnmark coast; (3) that Sir Charles Wingfield put forward specific requests for information as to the nature and extent of the Norwegian claims; (4) that Mr. Esmarch's reply was not responsive, and, even at that late date, he did not give any information that would enable the British Government to appreciate the nature and extent of the Norwegian System.'

¹ A short period in which to acquire a historic title. Yet it seems clear that if Norway had not acquired such a title by the date of the 1912 'Report'—the first published suggestion of a possible general Norwegian base-line system—she cannot have acquired one after, for the period 1912-35 is a period of war, incidents, protests, inquiries, and mutual discussions about Norwegian claims. For convenient short statements of the facts of this period see the article by Professor Waldock referred to above, pp. 119-24. However the Court said (*I.C.J.*, 1951, p. 138) that 'For a period of more than sixty years' (i.e. presumably 1869-1933) the United Kingdom Government had 'in no way contested' the Norwegian system, and that not until a Memorandum of July 27, 1933, did it make 'a formal and definite protest'. This may be compared with Judge Read's finding (*ibid.*, p. 203) that

'... from the time of the seizure of the *Lord Roberts*, in 1911, until the present the Parties

British vessel for fishing in alleged Norwegian waters, that might have drawn the specific attention of the United Kingdom Government to the nature of the Norwegian claims, and placed it in a position in which, if it did not protest, it might be held to have recognized the practice. So soon as such incidents did occur, i.e. from about 1911 onwards, the United Kingdom Government did protest.

- g. At the North Sea Fisheries Conference in 1882, which resulted in the North Sea Fisheries Convention (Norway's refusal to adhere to which the Court regarded as putting the United Kingdom Government 'upon notice' of Norway's claims), the only special claims put forward by Norway were (i) to a four-mile limit, and (ii) to treat all her fjords as national or inland waters. These were also the sole grounds put forward for Norway's non-adherence to the Convention. No suggestion of any general Norwegian system of base-lines drawn continuously round the coast from island to island on the extreme outer fringe was ever made. The fact that the other parties to the Convention refused to accept even Norway's four-mile and fjord claim, was evidence that *a fortiori* they would not have accepted any claim to employ a general base-line system.

(2) *Effect of the Fisheries case on the question of 'knowledge'*. In view of these considerations, what were the grounds on which the Court ascribed to the United Kingdom both knowledge and acquiescence in a general Norwegian system of base-lines? In considering this matter it must be remembered that the acquisition of a historic right by prescriptive means is merely a special case of the creation of right by custom or usage, similar in principle to the creation of a general rule of law by those means. It should further be explained that the United Kingdom admitted to knowledge (in the sense of awareness) of the two Norwegian Decrees of 1869 and 1889 as *being applicable to the restricted areas off Sunnmøre and Romsdal specified in them* and totalling less than one-fifteenth of the whole Norwegian coast-line. What the United Kingdom Government denied was any knowledge of or acquiescence in these Decrees as either laying down or purporting to lay down any system applicable to Norwegian waters *generally*.¹ The Court dealt with this point as follows (*I.C.J.*, 1951, p. 138):

have been in controversy about the extent of Norwegian waters and about the rights of British ships in areas which were regarded by the British Government as part of the High Seas. Parts of the controversy have been settled by . . . British concessions . . . Apart from these . . . the British Government has never admitted the right to measure territorial waters from long base-lines . . . and it has maintained throughout . . . that the waters must be measured from the low-water mark. The transmission of the 1912 Report was made after the commencement of the dispute.'

¹ Consequently, the review by Counsel for Norway of the reasons for thinking the United Kingdom Government knew of the *Decrees* (e.g. inclusion in various publications), did not address itself to the real issue, for as Judge Read (dissenting) said (*I.C.J.*, 1951, p. 200), there was not

'Norway has been in a position to argue without any contradiction that neither the promulgation of her delimitation Decrees in 1869 and in 1889, nor their application, gave rise to any opposition¹ on the part of foreign States. Since, moreover, these Decrees constitute . . . the application of a well-defined and uniform system, it is indeed this system itself which would reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable as against all States.'

Here the Court seems to have sanctioned the proposition (of which it will be necessary for Governments in the future to take careful account) that where States know of and acquiesce in the application of a special system to a limited area or in a special field, they may thereby be held to have acquiesced in its general application over the *whole* field. The Court proceeded (*ibid.*):

'The general toleration² of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it. One cannot indeed consider as raising objections the discussions to which the *Lord Roberts* incident gave rise in 1911, for the controversy which arose in this connection related to two questions, that of the four-mile limit, and that of Norwegian sovereignty over the Varangerfjord, both of which were unconnected with the position of base-lines. It would appear that it was only in its Memorandum of July 27th, 1933, that the United Kingdom made a formal and definite protest on this point.'

The view expressed in this passage has already been commented on. The Court continued (pp. 183-9):

'The United Kingdom Government has argued that the Norwegian system of delimitation was not known to it³ and that the system therefore lacked the notoriety

'any reason to believe that a Norwegian system had come into being in 1869-1889, or that these Decrees were anything more than local *ad hoc* measures'.

¹ It has already been seen that the absence of opposition is not *per se* conclusive. It depends whether the non-opposition is deliberate or the consequence of indifference, or whether it results from lack of knowledge or lack of realization of the significance of what is occurring. The view apparently taken by the Court as to the effects of lack of opposition may be compared with the finding of the German Imperial Supreme Prize Court in the case of the Swedish ship *Elida* (*S. Entscheidungen des Oberprisengerichts*, p. 9—as translated in *American Journal of International Law*, 10 (1916), p. 916), in what is now accepted as a classic statement of various aspects of the law of territorial waters:

'... the regulation of the individual state is not alone sufficient; the absence of objection on the part of other states is also required. Thereby in reality the permissibility of an extension of the territorial waters is founded not so much upon the independent regulation by the single state, as upon the supposition of a tacit acknowledgment of such an extension by the other states. A mere failure to object, however, is not identical with a positive concurrence of the nations.'

A somewhat similar view was expressed in the *Fisheries* case by Judge Alvarez, who did not consider it necessary to go into the merits of the historic aspect of Norway's claim since he considered the claim justified on other grounds:

'A State is not obliged to protest against a violation of international law, unless it is aware or ought to be aware of this violation . . .'

² This general 'toleration' resulted from the fact that hardly any States were aware of the Norwegian practice in its actual (or rather intended) extent and significance.

³ This needs qualification. What was not known to the United Kingdom was the existence of any general Norwegian practice as a *system*.

essential to provide the basis of an historic title enforceable against it. The Court is unable to accept this view. As a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the Decree of 1869 which had at once provoked a request for explanations by the French Government.¹ Nor, knowing of it, could it have been under any misapprehension as to the significance of its terms, which clearly described it as constituting the application of a system.² The same observation applies *a fortiori* to the Decree of 1889 relating to the delimitation of Romsdal and Nordmøre which must have appeared to the United Kingdom as a reiterated manifestation of the Norwegian practice.³

Clearly the knowledge here imputed to the United Kingdom is purely constructive, and it is necessary to realize for the future that a purely constructive and quasi-notional knowledge of this kind may be held sufficient. The next passage in the Judgment (p. 139) reads:

'Norway's attitude with regard to the North Sea Fisheries (Police) Convention of 1882 is a further fact which must at once have attracted the attention of Great Britain. There is scarcely any fisheries convention of greater importance to the coastal States of the North Sea or of greater interest to Great Britain. Norway's refusal to adhere to this Convention clearly raised the question of the delimitation of her maritime domain, especially with regard to bays, the question of their delimitation by means of straight lines of which Norway challenged the maximum length adopted in the Convention. Having regard to the fact that a few years before, the delimitation of Sunnmøre by the 1869 Decree had been presented as an application of the Norwegian system, one cannot avoid the conclusion that, from that time on, all the elements of the problem of Norwegian coastal waters had been clearly stated. The steps subsequently taken by Great Britain to secure Norway's adherence to the Convention clearly show that she was aware of and interested in the question.'

It has already been seen that Norway's non-adherence to this Convention and the United Kingdom attitude in that respect is capable of quite a different and not less plausible interpretation. The Court concluded (*ibid.*):

'The Court notes that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations.⁴

'The notoriety of the facts,⁵ the general toleration of the international community,

¹ It provoked an inquiry from France, because in the previous year a French vessel, the *Quatre Frères*, had been involved in an incident off the Norwegian coast. The United Kingdom had of course no knowledge of the Franco-Norwegian interchange. Incidentally, in the last French Note on this occasion it was made quite clear that France, while more or less acquiescing in the 1869 Decree as applicable to the Sunnmøre area, did not accept it as a precedent, i.e. did not in fact acquiesce in any *general* Norwegian base-line system of this kind.

² In fact, it was not until 1912 that the *Exposé des Motifs* of the Decree was published, from which alone it could perhaps have been inferred that a general system was in question.

³ See the preceding footnote.

⁴ This was because the United Kingdom was not in fact aware of any *general* Norwegian system to formulate reservations about.

⁵ As regards this notoriety, Professor Waldock (*loc. cit.*, p. 166) remarks: 'It is clear that, when the Norwegian jurist Aubert explained the Norwegian system to the Institute [of International Law] in 1894, he was enlightening his colleagues about something of which they were unaware

Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.'

The substantial question at issue in all this was whether the United Kingdom Government could reasonably be said to have extended what amounted to *recognition* of the Norwegian system, express or implied. The main conclusion to be drawn from the Court's decision on this point seems to be that it will henceforth be necessary for Governments to exercise a far higher degree of vigilance in such matters than has hitherto been thought necessary. As Professor Waldock has said (*loc. cit.*, p. 164):

'... the Court, when it held that the Norwegian system had the "*general toleration of the international community*" seems to have fixed states with a more stringent duty of alertness in scrutinizing the domestic legislation of other states and in objecting to claims—or even possible claims—*than is acted upon in state practice.*'

It would almost seem in fact as if the burden of proof to show *lack* of knowledge and acquiescence might now lie on the State denying the historic right, if the State claiming it can make out a bare *prima facie* case; though in point of fact the existence of any serious or even reasonable measure of doubt should lead to a finding against the claiming State.

§ 7. PROTESTS. ADMISSIONS

Although these are distinct topics they impinge on one another at various points: in certain circumstances failure to protest may amount to an admission, and an admission may be implied from silence or inaction.

(a) *Protests*

(1) *In prescriptive claims.* This matter has to a considerable extent already been considered in § 6 above. Protest in some shape or form, or equivalent action,¹ is necessary in order to stop the acquisition of a prescriptive right.² Moreover the protest must be an effective one depending on what the circumstances require. A simple protest may suffice to begin with, but this may not be enough as time goes on. These requirements presuppose, however, that the States against which the prescriptive right or title is set up, are in possession of the necessary *material* on which to make a protest, or take equivalent action if they want to—i.e. that they have knowledge of

before. The account which he then gave was, moreover, materially different from the system upheld by the Court. See *Annuaire [de l'Institut]*, XI (1889-92), pp. 136 ff.'

¹ Apart from the ordinary case of a diplomatic protest, or a proposal for reference to adjudication, the same effect could be achieved by a public statement denying the prescribing country's right, by resistance to the *enforcement* of the claim, or by counter action of some kind.

² The same could equally be said not merely of the acquisition by prescription of special rights otherwise contrary to general international law, but also of the establishing of *new* rights by the bringing into existence of new rules in a field not previously regulated by international law, e.g. that of rights to submarine areas (continental shelf, &c.).

what is going on, or actual or constructive notice of the claims made. If, however, adequate protest or equivalent action is forthcoming, there can be no doubt that it operates to prevent the acquisition of a prescriptive right or historic title, since the consent of States, express or implied, is necessary for such acquisition. The Court's findings in the *Fisheries* case are warrant for all these propositions (see *supra* generally under § 6), provided it is borne in mind that, on the basis of these findings, very little may be required to create a presumption of knowledge and acquiescence on the part of States.

(2) *The effect of protests on acquired rights.* In the *Minquiers* case, the question of the effect of protests arose in a somewhat different form. The case was one of rival claims to territory. But it was not a case of the acquisition of sovereignty by prescription, i.e. of one of the parties having originally been sovereign, and the other subsequently acquiring sovereignty by means of a long-continued adverse possession.¹ The case was rather one—and was so treated by the Court—of rival claims going far back into history, each of them capable of a greater or lesser degree of support on a variety of grounds, legal, historical and factual. The real issue was, which claim was, on the whole, the better one. In such circumstances it is obvious that the protests of either side against the acts of the other can only play a restricted role. The question of *acquisition* in the sense of an adverse title brought into being against the right of the true owner does not arise (for the whole dispute is as to which side does or ever did rank as the true owner). Consequently, neither side can, merely by protesting, invalidate the title or acts of the other. This was explicitly found by the Court in the following passage (*I.C.J.*, 1953, p. 66):

'By a British Treasury Warrant of 1875, constituting Jersey as a Port of the Channel Islands, the "Ecrehou Rocks" were included within the limits of that port. This legislative Act was a clear manifestation of British sovereignty over the Ecrehos at a time when a dispute as to such sovereignty had not yet arisen. The French Government protested in 1876 on the ground that this Act derogated from the Fishery Convention of 1839. But this protest could not deprive the Act of its character as a manifestation of sovereignty.'

Judge Levi Carneiro in his separate (but concurring) Opinion took the same view when he said (*ibid.*, p. 106), citing the *Eastern Greenland* case, that 'the character of the acts of the British Government is not altered by the protests which, from time to time, were made by the

¹ It was, of course, part of the French case that France originally had sovereignty over the Minquiers and the Ecréhous islets and rocks, and therefore that in the absence of any proof of abandonment by France, the United Kingdom claim could only be a prescriptive one. This view was implicitly rejected by the Court, but the reader may be referred to the very skilful and interesting argument of Professor André Gros, principal Legal Adviser to the French Foreign Office, and Counsel for France in the case (*Doct. Distr.* 53/156 *bis*, pp. 249-54) and to the United Kingdom reply on this point (*ibid.*, 156 *ter.*, pp. 347-52).

French Government'. All that a protest can do in such circumstances is to preserve and keep alive the claim of the protesting Government, so that no inference of *abandonment* can be drawn from its silence, or of *recognition* of the other party's position. The matter was aptly stated in the argument of Counsel for the United Kingdom¹ as follows (Doct. Distr. 53/156, p. 155):

'... the exact legal effect of a protest depends very much on circumstances, but in general all it does is to register or record the opinion of the protesting country that the act protested against is invalid and is not acquiesced in. But if the act concerned is in fact a valid act under international law, no protest can make it invalid. ... Any French protests could not of themselves have invalidated the British acts ... If effectual, the protests might keep France's claim alive in circumstances where it would otherwise have been irretrievably lost;² but again the protests would not of themselves make France's claim a good one. Its worth would continue to depend solely on its intrinsic merits.'

This view was endorsed by Judge Levi Carneiro in his separate but concurring Opinion, where he said (*ibid.*, pp. 107-8):

'... the French Government was satisfied to make a "paper" protest. Could it not have done anything else? It could have, and it ought to have, unless I am mistaken, proposed arbitration ... The failure to make such a proposal deprives the claim of much of its force; it may even render it obsolete.'³

(b) *Admissions*. Some light on the Court's attitude on this topic is afforded by pronouncements made in the *Fisheries*, *Minquiers* and *Morocco* cases, from which the following deductions can be drawn.

(1) *The admission of another State's claim or right, or the abandonment of a State's own position, will not lightly be implied*. In the *Fisheries* case (*I.C.J.*, 1951, p. 138) the Court said:

'... it is impossible to rely upon a few words taken from a single note to draw the conclusion that the Norwegian Government had abandoned a position which its earlier official documents had clearly indicated.'

Similarly, in the *Morocco* case the Court said (*I.C.J.*, 1952, p. 200):

'There are isolated expressions to be found in the diplomatic correspondence which, if considered without regard to their context, might be regarded as acknowledgments of

¹ This part of the argument was delivered by Mr. C. H. Harrison, C.M.G., Attorney-General of Jersey.

² It was argued by the United Kingdom that there was what amounted to abandonment of the French claim—first, because many of the French protests were perfunctory, ineffectual and not followed up, and secondly because there was complete failure to protest at all against some of the most conspicuous and unequivocal British acts of sovereignty. This was explained by the French Government on the ground that France did not wish to provoke incidents or make an issue out of a comparatively minor matter.

³ Judge Carneiro here implied that the failure to follow up the French claim in this way amounted to an abandonment of it for all practical purposes—given the character of the British acts of sovereignty which were not matched by any comparable manifestations on the French side.

United States claims to exercise consular jurisdiction and other capitulatory rights. On the other hand, the Court can not ignore the general tenor of the correspondence, which indicates that at all times France and the United States were looking for a solution based upon mutual agreement and that neither Party intended to concede its legal position.¹

(2) *Too much account should not be taken of superficial contradictions and inconsistencies.* In the *Fisheries* case, the Court said (*I.C.J.*, 1951, p. 138):

‘The Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in the Norwegian practice.’

A similar warning (though in a different context) against attaching too much importance to superficial considerations was given by Judge Basdevant in the *Ambatielos* case (First Phase), where he said (*I.C.J.*, 1952, pp. 69–70):

‘The drafting and the signature of an international agreement are the acts by means of which the will of the contracting States is expressed; ratification is the act by which the will so expressed is confirmed by the competent authority, for the purpose of giving it binding force. All these acts are concerned with the substance itself of an international agreement. But the recording of these acts in the instruments which are designed to give them material existence involves the physical operations of writing, printing, transmission by one party to the other, etc., operations which do not contribute to the formation of the will of the contracting States; those who have the task of forming, expressing or confirming this will, do not, as a rule, take part in these physical operations; these operations commonly take a form deriving from tradition, which is followed scrupulously, and therefore blindly, by the officials entrusted with this material task. It would be wrong to attribute to the details of form thus superimposed upon the juridical act of the conclusion of a treaty any determining influence, when it becomes necessary, in case of doubt, to ascertain the true meaning of the agreement which has been reached, the character which the parties intended to give to any given agreement concluded between them.

‘The scope to be given to a particular expression employed, or to a particular form which has been followed, should be considered in the light of these remarks when it is sought to determine whether the Declaration of 1926 is to be regarded as constituting a provision of the Treaty of the same date.’

(3) *A statement or act may fairly be interpreted as an admission when it appears to embody or represent the bona fide belief of the party making it.* In the *Minquiers* case such a view seems to have underlain the following pronouncement² (*I.C.J.*, 1953, p. 71):

¹ The jointly dissenting Judges in the *Morocco* case (Hackworth, Badawi, Levi Carneiro and Rau) took a different view of this correspondence (*I.C.J.*, 1952, p. 216):

‘In the light of these statements, it seems clear that in 1937, the French Government regarded the United States as entitled to avail itself of the capitulatory regime even after the Anglo-French Convention of 1937. We concur in this view. . . .’

² Judge Basdevant in his separate though (on the main issue) concurring Opinion, took a different view of the incidents concerned. His remarks on the first may be cited in full and in original (*I.C.J.*, 1953, pp. 80–81):

‘Sur le premier point, on doit déterminer l’effet de la lettre du ministre français de la Marine,

'By his Note of June 12th, 1820, to the Foreign Office, already referred to . . . , the French Ambassador in London transmitted a letter from the French Minister of Marine of September 14th, 1819, to the French Foreign Minister, in which the Minquiers were stated to be "*possédés par l'Angleterre*", and in one of the charts enclosed the Minquiers group was indicated as being British. It is argued by the French Government that this admission cannot be invoked against it, as it was made in the course of negotiations which did not result in agreement. But it was not a proposal or a concession made during negotiations, but a statement of facts transmitted to the Foreign Office by the French Ambassador, who did not express any reservation in respect thereof. This statement must therefore be considered as evidence of the French official view at that time.'

And again (*ibid.*):

'When the British Embassy in Paris, in a Note of November 12th, 1869, to the French Foreign Minister, had complained about alleged theft by French fishermen at the Minquiers and referred to this group as "this dependency of the Channel Islands", the French Minister, in his reply of March 11th, 1870, refuted the accusation against French fishermen, but made no reservation in respect of the statement that the Minquiers group was a dependency of the Channel Islands. It was not until 1888, that France, in a Note of August 27th, for the first time made a claim to sovereignty over that group, a claim which appears to have been provoked by a visit to the islets of the Jersey Piers and Harbours Committee.'

Similarly (*ibid.*, pp. 71-72):

'In 1929 a French national, M. Leroux, commenced the construction of a house on one of the islets of the Minquiers in virtue of a lease issued by French Government officials. In a Note of July 26th, 1929, the United Kingdom Government protested and said that they "have no doubt that the French Government, in order to obviate all risk of the occurrence of some untoward incident on the spot, will restrain Monsieur Leroux from proceeding further with his building operations". No reply appears to have been given by the French Government; but the construction of the house was stopped. That it was stopped at the instigation of that Government appears to follow from a Note of October 5th, 1937, from the French Ambassador to the Foreign Office, where it was stated that "the French Government, moreover, in spite of the slight distance between the Minquiers islands and the Chausey islands, did not hesitate, a few years ago, to prevent the acquisition of land on the Minquiers by French nationals".'

du 14 septembre 1819, dont copie, accompagnée d'une carte, a été remise, le 12 juin 1820, par l'ambassadeur de France au Foreign Office; mention y est faite des "îles . . . des Minquiers possédées par l'Angleterre". Prise à la lettre, cette mention trancherait le débat pour les Minquiers mais il ne me semble pas qu'on puisse lui reconnaître une telle autorité. Cette lettre n'a été transmise que pour fournir des éclaircissements, à l'occasion d'une négociation portant sur la protection des huîtres, non sur la souveraineté; elle émane d'un ministre qui n'a pas qualité pour prononcer sur une question de souveraineté territoriale et elle révèle même, chez son auteur, certains oublis graves; à Londres, elle fut jugée de si peu de poids que Canning, rédigeant ses instructions en vue des négociations qui suivirent et se plaçant sur le terrain du droit exclusif de pêche d'un État dans ses eaux territoriales et de la réciprocité, tout en admettant une zone de pêche réservée autour des îles Chausey qu'il tenait pour "inhabitées", n'a rien prévu ni pour les Minquiers ni pour les Écréhous. Le propos du ministre de la Marine ne paraît donc pas constituer une admission dont on puisse faire état aujourd'hui. Il serait tout aussi exagéré d'entendre le silence de Canning comme impliquant qu'il reconnaissait ces îlots comme échappant à la souveraineté britannique. D'un côté comme de l'autre, les hommes d'État responsables ne se posaient pas alors cette question.'

(4) *Proposals or concessions made in the course of negotiations do not rank as admissions.* It is implicit in the first of the passages cited under (3) above that the Court agreed with this principle, as such, but did not think the statement concerned had this character. It should be explained that the whole period 1819-39 was one of negotiation between the French and United Kingdom Governments concerning the fisheries (especially the oyster fisheries) off the Cotentin Peninsula and in the Bay of St. Malo. Judge Basdevant was evidently also of this opinion (see *supra*, p. 45, n. 2), but thought that the statement concerned lacked authority because it concerned not fisheries, but sovereignty, and the Minister making it was not competent to make authoritative statements on questions of sovereignty. Without going into the merits of this last point, it can be said that the principle that protects certain statements made in the course of negotiations is unquestionably sound—or there could be no negotiations. At the same time it would seem that this protection can only extend to statements that can reasonably be regarded as having some direct connexion with the subject and with the progress of the negotiations. In addition it can hardly extend to statements of fact.

§ 8. THE ACQUISITION OF STATE RIGHTS THROUGH THE ACTS OF INDIVIDUALS

(a) *Exclusive rights*

(1) *The general principle.* Some of the individual opinions in the *Fisheries* case affirmed the well-established rule of international law according to which State rights can only be acquired through the acts of persons in the service of the State, or authorized (either generally, or in reference to the particular matter involved) to act in the name or on behalf of the State: and therefore cannot in general be acquired through the acts of private persons, unless, exceptionally, they are so authorized—or if their act (purporting to assert e.g. a claim to sovereignty, jurisdiction or other exclusive right) is subsequently ratified and adopted by the State as its own.¹ Thus, in speaking of a claim by a State to a historic title to certain waters which would otherwise be part of the high seas, based on the mere fact that its fishermen had for long fished in those waters, Judge McNair (*I.C.J.*, 1951, p. 184) said:

‘... some proof is ... required of the exercise of State jurisdiction, ... the independent activity of private individuals is of little value unless it can be shown that they have acted in pursuance of a licence or some other authority received from their Governments or that in some other way their Governments have asserted jurisdiction through them.’

¹ The cases in which State rights can be acquired by the subsequent ratification of the act of a private individual are, however, distinctly limited: see below.

Similarly, Judge Hsu Mo said (*ibid.*, p. 157):

'... As far as the fishing activities of the coastal inhabitants are concerned, I need only point out that individuals, by undertaking enterprises on their own initiative, for their own benefit and without any delegation of authority by their Government, cannot confer sovereignty on the State, and this despite the passage of time and the absence of molestation by the peoples of other countries.'

(2) *In claims to sovereignty.* The matter is obviously of chief importance in regard to claims to sovereignty over territory or waters—and it is equally chiefly in that regard that it arises, though it is capable of arising in other connexions, for instance, the acquisition by one country, through its nationals, of special and exclusive¹ commercial privileges or rights in another. It has long been well settled that the hunting, whaling, guano collecting, exploring,² and other similar activities of private individuals acting on their own, however numerous and extensive, do not *per se* confer on their State a title to sovereignty over the areas concerned.³ In those cases where the acquisition of sovereignty depends on an act of volition, that act must be the act of the State, i.e. of its accredited agents or authorities, or persons specially authorized to act on its behalf. Otherwise it is not the State which is acting. In short, the act must be carried out *à titre de souverain*.

¹ For the question of the acquisition of *non-exclusive* commercial rights in this manner, see below.

² An explorer or discoverer often purports to 'take possession' of some territory on behalf of his country. If he is a commissioned officer of his country's armed forces, or otherwise in the service of its Government, or other properly accredited agent, or—though a private person—has received a special licence or authority to act in this way, the State will thereby (provided the case is one of territory which is *res nullius*—see further below) acquire the provisional or 'inchoate' title which mere discovery, or a mere initial taking of possession, is sufficient to set up (but not sufficient to perpetuate unless followed up by physical occupation, or such equivalent acts as may be appropriate to the circumstances of the territory: as to this see the *Palmas Island* and *Eastern Greenland* cases, *passim*). But if the discoverer or taker of possession does not fall into one of the above categories, his acts are in themselves ineffective to confer any title on his country or to constitute the basis of a claim of sovereignty unless subsequently ratified and adopted by his Government.

Furthermore, it seems very doubtful if this method of initiating a title can have any application except as regards territory which is *res nullius*, or can be made the foundation of a prescriptive claim. If certain territory is already, in law, under the sovereignty of another State, any act of taking possession of it on behalf of another is invalid and void, and therefore incapable of ratification. Such an act by an agent of the State, though invalid in itself, may count towards the ultimate establishment of a prescriptive claim because at least it is the act of the State, and the whole essence of a prescriptive claim is *adverse* possession, invalid until by the passage of time and the absence of protest on the part of the true owner a valid title is acquired. But where a private individual, not thereto authorized, purports to 'take possession' of what is some other country's, there is no State act at all—for his does not constitute one, and being intrinsically invalid (as well as unauthorized) cannot be ratified or adopted by his Government.

³ But such activities may of course be evidence of an already existing sovereignty. Thus in the *Minquiers* case much turned on the character of the activities of Jersey fishermen and others, at the disputed islets. The contention of the French Government was that these activities, in so far as they were of a private character, could not confer any title on the United Kingdom. The reply was that the United Kingdom was not purporting to have been acquiring title by occupation, let alone prescription, but to have been sovereign from time immemorial, and that such activities were evidence of this, since many of them were such as would not have been undertaken by these individuals if they had not thought British sovereignty existed.

It makes no difference whether the case is one of occupation of ownerless territory (*res nullius*) or of acquisition of a prescriptive title to territory originally under the sovereignty of another State.

(3) *In prescriptive claims—particularly to maritime territory.* The matter has special importance as regards the acquisition of a title by prescription—for whereas it might not be particularly surprising if the acts of individuals could, in certain circumstances, confer on their States a title to territory which was *res nullius* and ownerless, even though these acts were carried out for purely private purposes, it would be quite inadmissible that the title of one State should be ousted by the prescriptive claim of some other State when there had been no exercise by the latter of State authority as such, but only the action of its nationals acting in their personal capacity. The point was made in the United Kingdom Written Reply in the *Fisheries* case (*Proceedings*, vol. II, p. 658) as follows:

‘International law cannot permit the acts of private individuals to create a title to sovereignty in derogation of the existing rights of States.’

The matter is peculiarly liable to arise with regard to claims to coastal waters which would otherwise be part of the high seas—for the high seas are not *res nullius*, but *res communis* (in fact *res omnium communis*). This places claims to waters which would otherwise be high seas in a distinctive position in several respects:

- i. Claims to them cannot be asserted on a basis of occupation, but only of prescription, since only what is *res nullius* can be occupied.
- ii. Since the high seas are *res omnium communis*, in which all States, and the nationals of all States, have common rights, the individual activities of e.g. fishermen are primarily to be accounted for as an exercise of such common rights, and there is a presumption that these activities are not carried on either as an assertion, or in consequence of any claim, of *exclusive* right. Nor are such activities even evidence of the existence of such a right, as they might be in the case of a claim to land territory.
- iii. Consequently, the requirement of action *à titre de souverain* operates with especial force as regards claims to maritime territory outside admitted territorial waters (a) because this is necessarily a case of encroachment on the rights of other countries, and not merely of asserting a title to territory over which no other country has sovereignty; (b) because there is, in the circumstances, a presumption that common rights are being exercised and that no exclusive claim is intended.
- iv. The subsequent ratification or adoption as a State act of the unauthorized action of a private individual, purporting to assert or to be in the exercise of an exclusive claim to waters otherwise high seas, cannot be cited as a foundation of, or in support of, such a claim, for the initial

act of the individual would itself be invalid and void *ab initio* as an encroachment on common rights, so that there would be nothing to ratify or adopt. (A similar act by someone authorized thereto and representing the State would of course be illegal, but it would at least be the act of the State—even if its illegal act.¹ It could therefore generate an eventual prescriptive claim—for all prescriptive claims have their origin *ex hypothesi* in acts that are intrinsically illegal or lacking in a clear foundation of right.)

v. The status of the sea as *res communis* may also affect the character of the acts which, even though exercised *à titre de souverain*, will constitute an assertion of exclusive jurisdiction in respect of some part of it. As regards land territory, where in general² the case is one of the assertion either of an exclusive jurisdiction or of no jurisdiction at all, certain acts performed in relation to persons or property in the territory are, or may be, manifestations or evidence of sovereignty. But the same acts performed with reference to persons or vessels at sea raise no such presumption. All States habitually claim and exercise jurisdiction over their nationals and vessels at sea,³ but this involves in itself no assertion or claim of sovereignty or jurisdiction over the area in which the vessel happens to be.⁴ Consequently, to use the language of the United Kingdom Written Reply in the *Fisheries* case (*Proceedings*, vol. II, p. 658):

‘... the exercise of authority by a State over its own nationals beyond the generally accepted limits of maritime territory does not by itself form the basis of an historic, prescriptive claim.’

The same applies to the regulation of fisheries carried on by national vessels at sea outside the recognized limits of the regulating State’s coastal waters. Thus (*ibid.*, pp. 658–9):

‘... It is common for States to regulate national fisheries beyond the limits of their maritime territory without any encroachment upon the rights of other States. Legislation regulating methods of fishing in a given area thus does not provide evidence of an historic title unless it indicates an exercise of general sovereignty in the area to the exclusion of the sovereignty of other States.’

¹ Or it might be said to be illegal but nevertheless not a complete nullity, and therefore capable of engendering legal consequences.

² That is, apart from some special case, such as that of a *condominium*.

³ More strictly, over their vessels, including *prima facie* all on board irrespective of nationality.

⁴ Admittedly the exercise of jurisdiction in respect of *persons* (as distinct from property) in a territory does not necessarily imply an assertion of sovereignty over it, since if these persons are nationals of the State concerned, such jurisdiction might be exercised on a personal basis, as an act of jurisdiction *in personam*. But except in cases where the territory is clearly under the sovereignty of another country, such action is normally intended as an exercise of territorial jurisdiction, particularly if it purports to regulate the behaviour of the individuals concerned when in the territory; while if foreigners or property in the territory are in question, it is a clear case of the exercise of State authority over the territory.

(b) *Non-exclusive rights and the acquisition through individuals of a vested right to their continued exercise*

(1) *Non-exclusive rights in general.* Whereas claims to exclusive rights founded on the acts of individuals can only be maintained if the individuals were authorized, either in advance, or *ex post facto* by the adoption and ratification of the acts, such would not appear to be the case where all that is involved is a claim to possess, and to be entitled to continue to enjoy, rights of a non-exclusive character. Thus if the fishing vessels of a given country have been accustomed from time immemorial, or over a long period, to fish in a certain area, on the basis of the area being high seas and common to all, it may be said that their country has through them (and although they are private vessels having no specific authority) acquired a vested interest that the fisheries of that area should remain available to its fishing vessels (of course on a non-exclusive basis)—so that if another country asserts a claim to that area as territorial waters, which is found to be valid or comes to be recognized, this can only be subject to the acquired rights of fishery in question, which must continue to be respected.¹ Some such conception would seem to have underlain certain observations made by Judge Alvarez in the *Fisheries* case, when he included amongst the conditions upon which a State might determine the extent of its territorial waters, one to the following effect (*I.C.J.*, 1951, p. 150):

‘... that it does not infringe rights acquired by other States ...’

Again, in finding for Norway, he gave as one reason (*ibid.*, p. 153) that

‘... the delimitation ... does not infringe rights acquired by other States, ...’²

There would seem to be justice in this idea—for if a State can by a long-continued usage and practice build up a prescriptive or historical right to the waters of an area originally and in its essence *res communis*, so equally should a State which has specifically exercised its communal rights in respect of that area as such, over a long period of time, be entitled to continue to do so, notwithstanding the change in the status of the area. Indeed, it could be said that the latter claim is the stronger—since it only involves the retention and continued exercise of an existing right, not the acquisition of a new one.

(2) *Distinction between land and maritime territory as regards non-exclusive claims through individuals.* It would seem that a distinction has again to be drawn between the case of claims to retain rights exercised in an area of

¹ In relation to that particular country, that is: the principle could not apply to countries which, while having a *right* to fish in the area as *res communis*, never in fact exercised it.

² Judge Alvarez must be taken to have been referring to particular rights in respect of a particular area *as such* and not to the general rights of States in the sea as *res communis*—for otherwise no claim to extended waters on a historic or prescriptive basis would ever be possible, since, in its origin, such a claim must necessarily infringe the rights of other States.

land territory, and those exercised in an area of sea. This distinction shows itself in the following ways:

i. In the case of the sea, which is *res communis*, international law confers a positive right on all to exploit its resources—and anyone who does so is exercising a substantive right, and not merely availing himself of a faculty to do something which international law does not prohibit. But in respect of land territory, which is not *res communis* but, at most, *res nullius*, international law does not confer any specific right of use or exploitation, but merely a licence or faculty to that effect, so long as the territory remains *res nullius* and does not pass into the effective sovereignty of some particular country. The nature of the distinction can readily be seen by considering that a State which prevented the nationals of another country from exploiting the resources of the high seas would, *prima facie*, be committing an international wrong, unless it could show that the waters in question were not in fact high seas, but were already part of its territorial waters. But a State which prevented the nationals of another country from continuing to exploit the resources of land territory which was *res nullius*, by itself occupying and claiming sovereignty over the territory, would not, *prima facie*, be committing any international wrong—because international law gives States a right to assert an *exclusive* claim (if they choose to take the correct steps) over what is *res nullius*, but only gives them *non-exclusive* rights over what is *res communis*.

ii. From all this it follows that the private persons of one State exploiting the resources of territory that is *res nullius* (and not claimed by their State) do so subject to the right given to other States by international law to assert an exclusive claim to that territory by the means which international law recognizes; and such individuals take the risk that their exploitation may at any time be determined by the successful assertion of such a claim. In consequence—and since the exploitation does not take place on the basis of any positive right conferred by international law—it cannot, even if long continued, give rise to any acquired rights which would hold good in the face of a subsequent lawful appropriation of the territory by another State, and oblige the latter to permit the particular exploitation to be continued. As respects the sea, on the other hand, its resources, as *res communis*, are exploited in the exercise of a positive general right; and if this right is actually exercised for sufficiently long in a particular area, this may lead to the formation of a vested interest, conferring special rights in relation to that area as such, i.e. to continue the exploitation there, even though the area passes under the jurisdiction of a coastal State.¹

¹ It might be said that a particular area as *res communis* becomes affected with an interest or burden of non-change of status in favour of a particular State or States as respects the particular form of exploitation involved. If the area is taken over, so to speak, by a coastal State, it must be taken over subject to this interest or burden.

iii. Whereas in the case of a claim to sovereignty over land territory (which involves a claim of exclusive right), a State must act *à titre de souverain* through authorized persons or, within limits, persons whose acts are subsequently adopted and ratified, this is not so where what is in question is a claim to retain a right to exploit a maritime area—for such a right, being universal and non-exclusive, no authority to exercise it is needed by any individual so far as international law is concerned,¹ and by the exercise of the right on the part of its nationals a State may acquire a vested right in respect of a particular area to its continued exploitation by the nationals of that State.

§ 9. ABUSE OF RIGHTS.² THE PRINCIPLE OF GOOD FAITH IN INTERNATIONAL RELATIONS

The doctrine of abuse of rights, though never hitherto formulated as such by the Court, is implicit in such a passage as the following from the Judgment in the *Morocco* case (*I.C.J.*, 1952, p. 212):

‘The power of making the valuation rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith.’

There is little legal content in the obligation to exercise a right in good faith unless failure to do so would, in general, constitute an abuse of rights. Here therefore the Court may be said to have taken a step towards the recognition of this doctrine propounded in earlier cases by Judge Alvarez.³ This Judge again affirmed the doctrine both in the *Fisheries* case (*I.C.J.*, 1951, pp. 149, 150, 152, and 153)—in which he suggested that the principle of abuse of rights must now be regarded as constituting a definite limitation on State sovereignty—and in the *Anglo-Iranian Oil Company* case, where he said, *inter alia* (*I.C.J.*, 1952, p. 133), that

‘This . . . concept, which is relatively new in municipal law (it finds a place in the Civil Codes of Germany and Switzerland) is finding its way into international law and the Court will have to give it formal recognition at the appropriate time.’

Certainly this principle is beginning to gain currency in international law⁴ and, if used with circumspection, can play a useful part as a means of regulating situations that cannot be dealt with by the application of the ordinary rules (*ex hypothesi* this is so, since the ‘offending’ State is acting within its strict legal rights). There are nevertheless a number of

¹ Authority may of course be needed under the municipal law of the individual’s State, which may regulate, for example the carrying on of fisheries on the high seas by its nationals.

² For a consideration of this matter in earlier cases before the Court see the corresponding article in this *Year Book*, 27 (1950), pp. 12–14.

³ See the *Corfu Channel* case (Merits): *I.C.J.*, 1949, p. 47; and the (*Second*) *Admissions* case: *ibid.*, 1950, p. 15.

⁴ See, for instance, Bin Cheng, *General Principles of Law* (1953), especially pp. 121–32.

difficulties about the doctrine—particularly as to its exact character and extent and the consequences it gives rise to—which still await a solution.

§ 10. THE POSSESSION OF RIGHTS INVOLVES THE PERFORMANCE OF THE CORRESPONDING OBLIGATIONS¹

In stating his view in the *Fisheries* case that each State was entitled to determine the extent of its territorial sea, subject to certain conditions, Judge Alvarez (*I.C.J.*, 1951, p. 150) added the qualification 'provided . . . that it is capable of exercising supervision over the zone in question and of carrying out the duties imposed by international law',² and continued:

'States have certain rights over their territorial sea, particularly rights to the fisheries; but they also have certain duties, particularly those of exercising supervision off their coasts, of facilitating navigation by the construction of lighthouses, by the dredging of certain areas of sea, etc.'³

Judge McNair, in the same case, also referred to the existence of obligations in connexion with claims to maritime areas (*ibid.*, p. 160):

'International law imposes upon a maritime State certain obligations and confers upon it certain rights arising out of the sovereignty which it exercises over its maritime territory.'

While this matter arises chiefly with reference to claims to maritime or land territory, it is of general application to all cases where concomitant obligations are attendant upon the exercise of a right.

§ 11. THE PRINCIPLE OF 'SUBSEQUENT PRACTICE'

As being one of the principles of treaty interpretation applied by the Court, this doctrine was considered in this *Year Book*, 28 (1951), where it was seen (p. 20) that the Court had on two or three occasions regarded the manner in which parties to a treaty had acted in carrying it out as affording

¹ And see this *Year Book*, 27 (1950), p. 8, § 5.

² This principle is of course equally if not more applicable to the case of territorial claims. In the *Minquiers* case, it was part of the United Kingdom argument that regard must be had to the question of which of two rival claimants to certain territory appeared to be in a position to discharge, and was effectively discharging, the international obligations of a sovereign with respect to that territory.

³ It may well be doubted whether the existence of concomitant obligations is sufficiently realized by those who, for instance, put forward extensive claims to territorial waters—in certain cases up to a distance of 200 miles from the coast. The supervision of these great areas, in order to prevent their use for illicit purposes prejudicial to the rights of other States, to ensure the discharge of the coastal State's obligations as a neutral in war time, to provide for the freedom and safety of navigation at all times—to name but a few of the international obligations involved—would be a very onerous and, indeed, for all but the principal maritime States (which, however, are precisely those whose claims are usually strictly limited), an impossible task. This would suffice in itself—even if no other objection were involved—to indicate the inadmissibility of this type of claim.

a legitimate guide to its correct interpretation.¹ In somewhat the same way, subsequent events may throw light on a previous state of fact, or be evidence of the existence at an earlier date of certain rights—or of the possession of certain territory. Thus in the *Morocco* case, the United States argued that the continued exercise of a particular form of consular jurisdiction some fifteen years after the date on which all treaty right to do so had disappeared, was evidence of the existence at that date (and consequently at the time of the dispute) of an independent basis of right founded on ancient custom and usage. Similarly in the *Minquiers* case, the United Kingdom Government argued that if at a certain date a country was found to be in orderly, stable and apparently fully established control of certain territory, this was evidence of the existence of a similar state of things at an earlier date, since such a situation did not normally spring into being fully grown. In the *Minquiers* case, the Court applied the principle of subsequent practice in its treaty aspect in relation to the interpretation of an Anglo-French Fishery Convention of 1839, which played a considerable part in the case.² But one of the Judges who delivered a separate though concurring Opinion³ (Judge Basdevant) based his final conclusion almost entirely on the application of the principle of 'subsequent practice', i.e. on the view that later acts and events were evidence—and (in his opinion) conclusive evidence—of an earlier state of fact. In Judge Basdevant's view, the case turned mainly on the *de facto* position of the disputed islets and rocks at a certain period in the Middle Ages, and on whether at that time (i.e. the date of the Treaty of Brétigny) they were 'held' by the Kings of France or the Kings of England—the evidence being, he considered, inconclusive.⁴ In these circumstances the

¹ Not, of course, to the point of changing its clear meaning, but as evidence of what that meaning is if, on its wording, there is room for argument. However, indirectly, what amounts to a change in the original effect may be brought about—see the case of the United Nations Security Council 'veto' discussed at p. 22, n. 1, of this *Year Book*, 28 (1951). In such cases what really occurs is an amendment to the treaty by a tacit unwritten *consensus*. This in turn (in the case of instruments such as the United Nations Charter which prescribe particular procedures and conditions for effecting amendments) may subsume a tacit agreement to depart, for that particular case, from the normal method of effecting amendments.

² This will be considered in a later article in the present series. The short point was this: it was argued on behalf of France that the effect of the Convention of 1839 was either to preclude both parties from claiming the exclusive sovereignty over the disputed islets and rocks, or to preclude them from citing in support of such a claim any acts performed by them in relation to the islets and rocks subsequent to 1839 (this was the 'critical date' argument, which loomed so large in the case). The United Kingdom Government, apart from denying that the Convention could or did have any such effect on its language, cited the subsequent conduct of both parties in putting forward claims to exclusive sovereignty over the disputed *res*, as being utterly inconsistent with this interpretation and conclusively negating it.

³ Judge Basdevant in this opinion, which may well rank as one of the most masterly and profound delivered by an international judge in recent times, reached the same conclusion as the Court, but on grounds that differed markedly in a number of important respects.

⁴ Although the interpretation of a Treaty (that of Calais or Brétigny, of 1360) came into this—because it referred to islands 'held' by the King of France or the King of England as the case might be, but without specifying which they were or who held them—the real problem was not

fact that in more recent times there was clear evidence of British administration of and display of sovereignty over the disputed territory, and a corresponding absence of any sufficient evidence on the French side, afforded confirmation of the hypothesis (for which there was some—but not conclusive—evidence to be derived from medieval events) that in 1360 the islets and rocks were held by the King of England, and were accordingly assigned to England under the Treaty of Brétigny. Judge Basdevant stated his method of approach as follows (*I.C.J.*, 1953, p. 82):

‘It thus becomes necessary to enquire whether the facts invoked on either side are such as to confirm or invalidate the interpretation according to which the medieval division resulted in the disputed islets being included in the portion of the King of England. We are not here concerned to seek the birth of any new title enuring to him, but rather confirmation of the correctness of a probable, though uncertain, interpretation of this division.’

Then, after summarizing the facts, particularly since 1839, he went on (p. 83):

‘From the facts thus alleged and, in particular, from the action of the Jersey authorities, unimpeded by competing action on the part of the French authorities, it is possible to deduce some *ex post facto* confirmation of the reasonableness of the hypothesis previously stated, according to which the King of England, who held the principal islands in 1360, was in a position to exercise power over the Ecrehos and the Minquiers and that he held these islets within the meaning of the Treaty.’

Judge Basdevant accordingly concluded (*ibid.*):

‘Thus the United Kingdom has, in modern times and at the present day,¹ held the disputed islets so that the hypothesis that the King of England formerly held them appears to be reasonable.’

In the *Morocco* case, on the other hand, the Court refused to accede to the argument that the exercise of certain consular jurisdiction in the period 1937–52 afforded evidence of the existence of a right, founded on ancient custom and usage, which survived the disappearance of specific treaty rights in 1937.² However, the Court did not deny the principle underlying the United States contention that France had since 1937 recognized the existence of a United States right to exercise the jurisdiction in question. Thus the Court said (*I.C.J.*, 1952, p. 200):

‘This contention has also been based upon the practice since the date when the treaty right of the United States to exercise extended consular jurisdiction and deri-

to interpret the Treaty (which was in a sense quite clear) but to establish the existence of a state of fact, i.e. which party then ‘held’ certain islands. Once that was established, the interpretation of the Treaty would follow automatically.

¹ It may at first sight seem a little startling for a judicial opinion to be based on the interaction of events separated by a period of as much as 500 years. But the facts of the *Minquiers* case were unusual.

² Although the issue as presented in this case exhibits certain differences of principle from the same issue as it appeared in the *Minquiers* case, it was very similar.

vative rights came to an end with the coming into operation of the Convention between France and Great Britain of 1937.¹

The Court recognized that in the subsequent diplomatic correspondence between France and the United States there were passages which, if considered in isolation, (*ibid.*)

‘... might be regarded as acknowledgments of United States claims to exercise consular jurisdiction and other capitulatory rights.’

However, the Court went on to find that the ‘general tenor of the correspondence’ did not support this view, and that although the parties were looking for an agreed solution of the question,² each reserved its legal position. Consequently (*ibid.*):

‘In these circumstances, the situation in which the United States continued after 1937 to exercise consular jurisdiction... is one that must be regarded as in the nature of a provisional situation acquiesced in by the... authorities.’³

In other words, the Court held that although United States jurisdiction had been exercised after and since 1937, this had not been on any acknowledged basis of right, and was not therefore evidence of the existence of such a basis in and before 1937, independently of the treaty right which then came to an end.⁴ The jointly dissenting Judges (Hackworth, Badawi, Carneiro and Rau), on the other hand, apart from interpreting the post-1937 correspondence quite differently (*I.C.J.*, 1952, pp. 218–19), cited French *acts* subsequent to 1937 (such as the transmission of Moroccan laws to the United States Government to have them made applicable to United States nationals) which, in their view, appeared to be based on the recognition of a United States right, coupled with evidence from the diplomatic correspondence between the two countries (*loc. cit.*, p. 221) showing that as early as 1937 the United States Government informed the French Government that it claimed rights based on usage independently of treaty. The dissenting Judges then went on to give specific expression to the principle of ‘subsequent practice’ (which, it has been seen, the Court did not, as a principle, deny) in the following passage (*ibid.*):

¹ The point was that these particular rights depended on the operation of most-favoured-nation clauses in a United States–Moroccan Treaty of 1836, by which the United States had come to enjoy the benefit of treatment accorded to Great Britain by Morocco in 1856. Great Britain had, however, surrendered her rights by a Convention of 1937.

² The problem posed was that after 1937 the United States was the only Power still exercising consular jurisdiction in Morocco, all the others which had previously done so, whether by treaty or on some other basis, having renounced or ceased to claim their rights.

³ Without doubt the Court took a strict—perhaps a rather restrictive—view of the effect of the correspondence. On this matter the reasoning of the jointly dissenting Judges is cogent. However, there may only be a fine dividing line between not admitting the existence of a right but being unwilling in practice to force a termination of its existence, and recognizing the right but seeking to negotiate its termination by agreement.

⁴ Thus, having previously found that the facts up to 1937 did not warrant the view that the United States had rights independent of treaty and founded on usage, the Court concluded that the United States rights in question were at an end.

'Thus the French Government knew in 1937 that the United States was asserting usage as at least one legal basis of its rights, and in spite of this knowledge, the French Government continued the old practice without any reservation. It was not, therefore, a case of mere "gracious tolerance". As we have shown, usage has been continuously at work, in varying measure, during a period of nearly a hundred years, if not longer, and, therefore, what has been happening since 1937 is evidence of a continuous process which began nearly a century before that date.'

§ 12. CUMULATIVE RIGHTS. RIGHTS WITH A DOUBLE FOUNDATION

This matter figured prominently in the *Morocco* case.¹ It arises wherever rights existing in one form (e.g. under a treaty) are said also to have another and an independent basis. That this can be and often is the position, admits of no doubt. For instance—and this is frequently the case with some of the more ancient treaties—rights originally granted by treaty may subsequently become the subject of general rules of international law,² so that even if the treaties concerned terminated, the rights in question would continue to be enjoyed on the basis of general international law. Conversely, parties may for some special reason³ incorporate or give expression to, or affirm or declare in a treaty, some already existing rule of international law which is in any case binding on them as such. Should the rule subsequently change, or a different international practice spring up, it might be argued that, by reason of the treaty, the old rule or practice still governed the relations between the parties to it: (the validity of this argument, however, would depend to a great extent on the circumstances of the case and the wording and character of the treaty).⁴ In the *Morocco* case, the matter arose out of the fact that the right of the United States to exercise full consular jurisdiction in respect of cases involving United States citizens, depended primarily on the operation of most-favoured-nation clauses in a United States–Morocco Treaty of 1836 (which replaced an earlier and broadly similar Treaty of 1787).⁵ Under the substantive provisions of this Treaty, the United States had only enjoyed a limited consular jurisdiction, but, by

¹ It also figured prominently, but in a rather different form, in the *Ambatielos* case (Second Phase). This will more conveniently be dealt with in a later article in the present series.

² It is not unusual for rules of international law to have developed by means of and into a generalization of what were originally a number of bilateral arrangements. This is the case, for instance, with a number of the rules concerning the treatment of foreigners.

³ For example in cases of doubt or controversy as to the exact character or scope of the rule: or another possibility would be in order to bring a breach of the rule within the scope of a compulsory arbitration clause contained in the treaty—but an explicit statement of the rule would be necessary to produce that effect.

⁴ For instance, following on the *Fisheries* decision, a country which might otherwise feel itself justified in re-defining its territorial waters on a base-line foundation, might be precluded from doing so by the operation of a fishery regulation convention to which it was a party, and which made it clear that foreign vessels had the right to fish in waters that would become territorial or internal if base-lines were drawn—or at any rate the coastal State concerned might be precluded from excluding such vessels from those waters even if a re-definition were carried out.

⁵ There was also a most-favoured-nation provision in the general Convention of Madrid of 1880, but this is not relevant to the present discussion.

reason of a most-favoured-nation provision, was entitled to exercise such more extended jurisdiction as might be granted to other States.¹ In consequence of this, the United States became entitled to exercise an extended consular jurisdiction amounting to full capitulatory rights by virtue of a British-Moroccan Treaty of 1856, and a Spanish-Moroccan Treaty of 1861, which brought this most-favoured-nation clause into play. But the rights enjoyed by Spain under the latter Treaty were renounced in 1914,² and the United Kingdom's capitulatory rights were renounced in 1937.³ France thereupon considered that the United States extended jurisdiction was no longer exercisable, and that United States rights were now limited to the jurisdiction specifically conferred by the original United States-Morocco Treaty of 1836.⁴ When the matter came before the Court, the United States contended on three main grounds that its extended jurisdictional rights possessed, or had acquired, a separate foundation, and were no longer dependent solely on rights enjoyed by virtue of the play of the most-favoured-nation clause of the 1836 Treaty. These grounds were 'incorporation by reference' on a permanent basis of the rights of other States amongst the rights to be enjoyed by the United States; 'transformation' by means of an implication resulting from certain multilateral treaties (the Madrid Convention of 1880 and the Act of Algeciras of 1906) recognizing or assuming the enjoyment of capitulatory rights by the Powers in Morocco; and finally an independently acquired right on the basis of custom and usage.

(a) '*Incorporation by reference*'. The United States argument was, in essence, that in the circumstances obtaining in Morocco, the *method* by which certain rights were acquired did not govern their status and duration *after* acquisition—that the most-favoured-nation system was merely a convenient procedural way of accomplishing a certain end, namely, the vesting of capitulatory rights in all the Powers having interests in Morocco, and nationals resident or trading there; but that although the rights might be *acquired* by these means, they became definitive and vested and independently based as of right once they had been so acquired. In short, the United States argued in effect that there was no point in every Power

¹ The difference was between cases in which *both* parties had to be United States nationals, and those in which it sufficed to give United States consular courts exclusive jurisdiction if the defendant alone was a United States national.

² It was argued by the United States that this renunciation was not outright and final, but merely a voluntary suspension of the exercise of jurisdiction, so that the basic right was still possessed by Spain; but the Court rejected this view.

³ By a Convention which also provided for the renunciation of French capitulatory rights in Zanzibar, and followed close upon the Montreux Convention for the general abolition of capitulations in Egypt of May 1937—all of which arrangements formed part of one complex.

⁴ As has been seen, however (in § 11 above), France did not insist on an immediate cessation of United States consular jurisdiction, but endeavoured to bring this about by agreement; but the United States maintained that they still had an independent right, notwithstanding the events of 1937.

having a treaty with the Shereefian Government providing in full detail for the exercise of capitulatory rights: it sufficed if one or two did, and if the rest relied on most-favoured-nation rights. But the full substantive rights involved must thereby be deemed to have been incorporated in the treaties of these other Powers by a process of 'drafting by reference', so that these rights were as much part of these other treaties as if they had been set out there in terms; and they could therefore only end with the termination of those treaties themselves, and not by reason of the termination of the treaty whose terms were thus incorporated in them by reference. The Court, however, rejected this argument as follows (*I.C.J.*, 1952, pp. 191-2):

'The second consideration was based on the view that the most-favoured-nation clauses in treaties made with countries like Morocco should be regarded as a form of drafting by reference rather than as a method for the establishment and maintenance of equality of treatment without discrimination amongst the various countries concerned. According to this view, rights or privileges which a country was entitled to invoke by virtue of a most-favoured-nation clause, and which were in existence at the date of its coming into force, would be incorporated permanently by reference and enjoyed and exercised even after the abrogation of the treaty provisions from which they had been derived.

'From either point of view, this contention is inconsistent with the intentions of the parties to the treaties now in question. This is shown both by the wording of the particular treaties, and by the general treaty pattern which emerges from an examination of the treaties made by Morocco with France, the Netherlands, Great Britain, Denmark, Spain, United States, Sardinia, Austria, Belgium and Germany over the period from 1631 to 1892. These treaties show that the intention of the most-favoured-nation clauses was to establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned. Further, the provisions of Article 17 of the Madrid Convention, regardless of their scope, were clearly based on the maintenance of equality.

'The contention would, therefore, run contrary to the principle of equality and it would perpetuate discrimination. It can not support the Submission of the United States regarding the extent of the consular jurisdiction in the French Zone.'

It will be seen that the Court based its rejection of the United States thesis on the ground that for the United States to retain its capitulatory jurisdiction when the States upon whose rights those of the United States depended, had renounced their rights, would 'run contrary to the principle of equality and . . . perpetuate discrimination'. This ground, however, did not fully deal with the issue posed by the United States contention—for if it was correct to say that the United States rights, though originally acquired by the operation of the most-favoured-nation process, had, by virtue of the special conditions obtaining in Morocco, assumed an independent status and the character of a vested interest, no lack of equality or discrimination *in law* would arise from the fact that certain States, having voluntarily renounced their rights, could no longer exercise them, whereas the United States could—because in the circumstances an express United States renunciation would be necessary, and none had been effected.

(b) *Merits of the 'incorporation' argument.* The real issue was whether it was correct to regard jurisdictional rights in Morocco acquired by the most-favoured-nation process as having become independently based. In the ordinary way there can be no doubt that this is not the case with most-favoured-nation rights—or clauses providing for the grant of them would only be entered into very infrequently. The purpose of a most-favoured-nation clause is precisely not to grant any *specific* rights, but to avoid discrimination. The grantee gets whatever the most-favoured-nation gets, but no more; and if at any time the latter ceases to get it (e.g. because its own treaty rights determine for some reason), the former country ceases to get it also. Just as the recipient of most-favoured-nation rights has no cause of complaint if it never comes to enjoy any better treatment than it is already receiving, because no other State receives better, and there is therefore nothing for the most-favoured-nation right to operate on—so it has no ground of complaint if it ceases to receive certain treatment acquired on a most-favoured-nation basis, because the most-favoured-nation has itself ceased to receive it. In either event it is getting precisely what was agreed upon—namely, the same treatment (whatever that may be) as the most-favoured-nation. In either case there is no discrimination.¹

The United States contention in the *Morocco* case however, was, in effect, that in Morocco the object of the most-favoured-nation clause was only up to a point non-discrimination as such. It was evidently intended to enable all the Powers concerned to acquire certain jurisdictional rights on a basis of equality; but after that the matter depended on the individual action of each State, and it was a matter for each Power to determine for itself whether the rights in question were to be retained, and for how long. These rights, if renounced, had to be renounced by each State individually, and could not be renounced for it by the act of another State. In short, under Moroccan conditions the matter might originate in contract, but *become* one of status not dependent on contract. It is clear that, having regard to the normal implications of a most-favoured-nation provision, such an argument could only hope to succeed if a special case could be established in respect of these jurisdictional rights. This is what the United States endeavoured to do, citing the particular circumstances in Morocco, the nature of capitulatory jurisdiction, the inappropriateness of subjecting foreigners to a local jurisdiction founded on Mohammedan law, and the fact that this law was itself based on personal rather than territorial

¹ A most-favoured-nation provision in fact confers *per se* only a partial and *inchoate* right, requiring to be completed by something further. It confers no right to any *specific* treatment except in a certain event, namely, that some other State receives that treatment. The right to this treatment is moreover contingent at all times on both elements being in existence, and the wording of the clause normally clearly implies not merely that the treatment is only due *if*, but also that it is only due *so long as*, the other State is receiving it.

concepts, and applied the principle of personal status in matters of jurisdiction. However, this view did not prevail.¹

(c) '*Transformation*', by implication from other treaties. Here the United States argument was that certain multilateral treaties—the Madrid Convention of 1880 and the Act of Algeciras of 1906—contained provisions referring to the capitulatory rights of the various Powers in Morocco and to the exercise of consular jurisdiction there, in such terms as in effect to afford an independent basis for those rights, and to be constitutive of them *de novo*, not merely confirmatory—or, if confirmatory, that these instruments confirmed the rights in question in the sense not merely of assuming and declaring their pre-existence, but of assuring their continued existence. Thus, any such rights which previously were dependent only on the operation of a most-favoured-nation clause, became independently founded in the substantive sense by virtue of these instruments, and no longer depended solely on the existence of the most-favoured-nation position. In other words, by a process of 'transformation', contingent rights were converted into 'autonomous' ones, for the Madrid Convention and the Act of Algeciras by implication conferred a separate self-existent right to something previously enjoyed on a different basis. There is, of course, in principle no reason why such a position should not be. But whether it is or not, must depend on the interpretation of the instrument concerned. The Court, while admitting this principle (see below), did not think that the two instruments concerned brought about any such process of 'transformation' in the sense suggested by the United States argument. These instruments presupposed the existence of the jurisdiction in question but, in general, did not go any further. As regards the Madrid Convention, the Court said (*I.C.J.*, 1952, p. 196):

'There can be no doubt that the exercise of consular jurisdiction in Morocco in the year 1880 was general, or that the Convention presupposed the existence of such jurisdiction. It dealt with the special position of protégés and contained provisions for the exercise of jurisdiction with regard to them.

¹ The United States could also perhaps have relied more than it did on the principle of acquired rights or vested interests, instead of on a supposed intention of the parties to incorporate a set of provisions into one treaty by a process of reference to another—an intention which, as such, they probably never had. On the other hand, the enjoyment over a period of 150 years not of mere commercial rights, but of rights in the nature of status, might well be regarded as resulting in the acquisition of a vested right determinable only by consent.

Another interesting argument, not put forward by the United States, turns on the question of what exactly it is that is acquired by means of a most-favoured-nation clause. It might be argued that if State *A* has a right to the same treatment as State *B*, and State *B* has or acquires a right to certain treatment only determinable at its own (*B*'s) consent, *A* acquires a right to the same treatment *under like conditions*, i.e. only determinable, so far as *A* is concerned, on *A*'s consent. Then, even if *B* renounces the treatment concerned, *A* is still entitled to it. The orthodox view, however, is that *A* can only claim the *substantive* treatment in question on the basis that (and therefore only so long as) *B* is getting it or has a right to it. If *B* renounces or otherwise loses the right therefore, so automatically does *A*.

'On the other hand, it is equally clear that there were no provisions of the Convention which expressly brought about a confirmation of the then existing system of consular jurisdiction, or its establishment as an independent and autonomous right.

'The purposes and objects of this Convention were stated in its Preamble in the following words: "the necessity of establishing, on fixed and uniform bases, the exercise of the right of protection in Morocco and of settling certain questions connected therewith. . . ." In these circumstances, the Court can not adopt a construction by implication of the provisions of the Madrid Convention which would go beyond the scope of its declared purposes and objects. Further, this contention would involve radical changes and additions to the provisions of the Convention. The Court, in its Opinion—Interpretation of Peace Treaties (Second Phase) (*I.C.J., Reports, 1950*, p. 229)—stated: "It is the duty of the Court to interpret the Treaties, not to revise them."

Similarly, as regards the Act of Algeciras, the Court held (*ibid.*, p. 198):

'Neither the Articles to which reference has been made above nor any other provisions of the Act of Algeciras purport to establish consular jurisdiction or to confirm the rights or privileges of the regime of Capitulations which were then in existence. The question, therefore, is whether the establishment or confirmation of such jurisdiction or privileges can be based upon the implied intentions of the parties to the Act as indicated by its provisions.

'An interpretation, by implication from the provisions of the Act, establishing or confirming consular jurisdiction would involve a transformation of the then existing treaty rights of most of the twelve Powers into new and autonomous rights based upon the Act. It would change treaty rights of the Powers, some of them terminable at short notice, e.g., those of the United States which were terminable by twelve months' notice, into rights enjoyable for an unlimited period by the Powers and incapable of being terminated or modified by Morocco. Neither the preparatory work nor the Preamble gives the least indication of any such intention. The Court finds itself unable to imply so fundamental a change in the character of the then existing treaty rights as would be involved in the acceptance of this contention.'

Nevertheless the Court recognized the principle that rights provided for, and having their origin, in one treaty, might acquire a separate and independent existence under another, for it went on to say (*ibid.*):

'There is, however, another aspect of this problem arising out of the particular Articles to which reference has been made above. These are the Articles which include provisions necessarily involving the exercise of consular jurisdiction. In this case, there is a clear indication of the intention of the parties to the effect that certain matters are to be dealt with by the consular tribunals and to this extent it is possible to interpret the provisions of the Act as establishing or confirming the exercise of consular jurisdiction for these limited purposes. The maintenance of consular jurisdiction in so far as it may be necessary to give effect to these specific provisions can, therefore, be justified as based upon the necessary intentment of the provisions of the Act.

'This result is confirmed by the provisions of Articles 10 and 16 of the Convention between Great Britain and France of July 29th, 1937. These Articles refer to the jurisdictional privileges "accorded on the basis of existing treaties" or "enjoyed by the United States of America under treaties at present in force". They pre-suppose, therefore, that the jurisdictional privileges of the United States, even after the surrender of

British capitulatory rights, would not be limited to the jurisdiction provided by Articles 20 and 21 of the Treaty with Morocco of 1836.⁷

The criterion adopted by the Court appears to have been whether the individual provisions were such that they could not be effective without the continued existence of a measure of consular jurisdiction, so that the exercise of such jurisdiction was 'necessarily' involved by those provisions.¹ Then the Court summed up as follows (*ibid.*, p. 199):

'The Court is not called upon to examine the particular articles of the Act of Algieras which are involved. It considers it sufficient to state as its opinion that the consular jurisdiction of the United States continues to exist to the extent that may be necessary to render effective those provisions of the Act of Algieras which depend on the existence of consular jurisdiction.

This interpretation of the Act, in some instances, leads to results which may not appear to be entirely satisfactory. But that is an unavoidable consequence of the manner in which the Algieras Conference dealt with the question of consular jurisdiction. The Court can not, by way of interpretation, derive from the Act a general rule as to full consular jurisdiction which it does not contain. On the other hand, the Court can not disregard particular provisions involving a limited resort to consular jurisdiction, which are, in fact, contained in the Act, and which are still in force as far as the relations between the United States and Morocco are concerned.'

(*d*) *Independent basis in usage and custom.* It was argued that, independently of treaty, United States capitulatory rights in Morocco were based on long-continued usage and custom, and had therefore acquired separate and self-existent legal force. The nature of the argument is best seen from the

¹ The nature of the provisions which, in the Court's view, had this character can be seen from the following passages in the jointly Dissenting Opinion of Judges Hackworth, Badawi, Carneiro and Rau (*I.C.J.*, 1952, pp. 217-18):

'The Act of Algieras is a great multilateral convention directly binding upon Morocco and the United States as well as the other signatory Powers. Its status in regard to the old bilateral treaties, as an independent and superior act, is formally expressed in its last Article 123. The scheme of rights and obligations which it established, whether expressly or by necessary implication, as between Morocco and the United States can not, therefore, be allowed to be impaired by any transactions concluded between any of the other signatories without the concurrence of both Morocco and the United States. This appears to us to be fundamental.

'The consular system has been adopted in the Act, not so much by express provision as by necessary implication. It would have occurred to no one to do so except by implication, because the system was part of the established order at that time. To give effect to the bare provisions of the Act and ignore this basic implication in respect of all other cases of the exercise of consular jurisdiction would result in curious anomalies. For example, it is admitted that actions against a United States national by the State Bank of Morocco must, under Article 45 of the Act, be brought before the United States consular court; but not any other civil action by a Moroccan or a foreigner. What is there peculiar to the Bank's actions that they and they alone should be tried by the consular court? Similarly, what is the special feature of prosecutions for breach of customs and arms regulations that they and they alone should be dealt with by the consular court under Chapters II and V of the Act? Furthermore, what is there peculiarly onerous about the taxes mentioned in Chapter IV of the Act that they and only they should be leviable from foreign nationals subject to the safeguards provided in that Chapter, while other and perhaps heavier taxes may be freely levied? It is difficult to find a satisfactory answer to these questions.'

following passages from the joint dissenting Opinion of Judges Hackworth, Badawi, Carneiro and Rau, who agreed with this contention. After expressing the views on the general character of usage cited above, the joint dissenting Opinion proceeded as follows (*I.C.J.*, 1952, p. 220):

'The full consular jurisdiction which the United States in fact exercises in Morocco to this day has been in existence for nearly a hundred years, if not longer; and during this long period both treaties and usage, in the broad sense of these terms, have contributed to the total results in varying measure. It is not possible, nor is it of any practical interest, at this distance of time, to isolate and assess separately the contribution made by each of these sources. Both were at work supplementing each other.

'The first treaty in which full consular jurisdiction was conceded by the ruler of Morocco to a foreign Power appears to be the Anglo-Moroccan General Treaty of 1856. It is admitted in the French Government's Reply to the Counter-Memorial of the United States Government that this Treaty incorporated existing usages, which necessarily implies that usage was at work even before 1856. It is true that the admission has been made for the purpose of contending that after incorporation the usages shared the fate of the Treaty, a contention with which we do not agree; nevertheless, there is the admission that the Treaty incorporated prior usage.¹

'Article XIV of that Treaty and Article XVI of the Treaty of 1861 between Morocco and Spain are, equally, evidence that usage was at work before, as well as during the period of these two Treaties. These Articles provide that litigation between British subjects or Spanish subjects and other foreigners shall be decided solely in the tribunal of the foreign consuls without the interference of the Moorish Government "according to the established usages which have *hitherto* been acted upon or may *hereafter* be arranged between such consuls", or "could according to established forms, or according to those which may be agreed upon among the said consuls". This shows that usage was operating and was supplementing treaties both before and after 1856 and 1861.'

The Court however, while not denying the principle that, apart from treaty, an independent basis of right, founded on custom and usage, might exist, held as a fact that United States rights in Morocco were based solely on treaty and not at all on custom or usage. Speaking of the period 1787-1937, the Court said (*ibid.*, 199-200):

'... throughout this whole period, the United States consular jurisdiction was in fact based, not on custom or usage, but on treaty rights. At all stages, it was based on the provisions either of the Treaty of 1787 or of the Treaty of 1836, together with the provisions of treaties concluded by Morocco with other Powers, especially with Great Britain and Spain, invoked by virtue of the most-favoured-nation clauses. This was the case not merely of the United States but of most of the countries whose nationals were trading in Morocco. It is true that there were Powers represented at the Conference of Madrid in 1880 and at Algeciras in 1906 which had no treaty rights but were exercising

¹ *Merger of rights.* This passage raises an interesting general point, not dealt with by the Court itself because it held that in fact no rights based on usage or custom existed. In principle, however, there is nothing to prevent specific State rights, originally arising from custom and usage, and subsequently made the subject of express treaty provisions, from becoming dependent solely on the treaty, the usage basis being merged in and absorbed by the treaty basis, in such a way as not to be revived by the termination of the treaty right. This would obviously be a matter of the interpretation of the treaty in the light of the circumstances.

consular jurisdiction with the consent or acquiescence of Morocco. It is also true that France, after the institution of the Protectorate, obtained declarations of renunciation from a large number of other States which were in a similar position. This is not enough to establish that the States exercising consular jurisdiction in pursuance of treaty rights enjoyed in addition an independent title thereto based on custom or usage.'

It will be seen that the Court accounted for the fact that certain States had exercised capitulatory rights in Morocco without having any specific treaty basis for so doing, as resulting from Moroccan 'consent or acquiescence'. The United States had argued (*a*) that these States could in the circumstances only have enjoyed these rights on the basis of custom or usage, and that this showed the existence in a general way of a custom or usage in Morocco whereby foreign Powers enjoyed capitulatory rights; (*b*) that the United States was entitled as a foreign Power to the benefit of this general custom or usage; (*c*) that the United States at least had a treaty with Morocco, and could therefore scarcely be held to be in a worse position than Powers that had no treaty at all; and (*d*) that France had obtained from these other Powers a specific renunciation of their rights and should therefore obtain one from the United States also. This was equally the view of the jointly dissenting minority Judges, who said (*I.C.J.*, 1952, p. 221):

'Thus the French Government knew in 1937 that the United States was asserting usage as at least one legal basis of its rights, and in spite of this knowledge, the French Government continued the old practice without any reservation. It was not, therefore, a case of mere "gracious tolerance". As we have shown, usage has been continuously at work, in varying measure, during a period of nearly a hundred years, if not longer, and, therefore, what has been happening since 1937 is evidence of a continuous process which began nearly a century before that date.'

The Court, however, thought that the existence of a *general* custom accepted as law had not been proved; and evidently regarded the rights of the non-treaty Powers as being based on specific *ad hoc* agreement even if only tacit—(they 'were exercising consular jurisdiction with the consent or acquiescence of Morocco'). The implication is that such consent or acquiescence was capable of being withdrawn (e.g. upon giving reasonable notice), and therefore these Powers were not in a better position than the United States, for the latter's rights were treaty rights that could only be determined either by its consent, or by that of the State whose own treaty rights the United States shared by the most-favoured-nation process.¹

¹ Mr. Bin Cheng ('Rights of United States Nationals in the French Zone of Morocco', in *International and Comparative Law Quarterly*, 1953, at pp. 361-2) has drawn attention to certain difficulties in the Court's treatment of the position of these non-treaty Powers. But presumably the Court's view was that even if, by virtue of its most-favoured-nation rights, the United States was entitled to the same substantive treatment (i.e. the same jurisdictional rights) as these other Powers, it was no more entitled to them after they had, by renunciation or otherwise, ceased to exist for those Powers, than it was to Spanish or United Kingdom rights when these were renounced by the two countries concerned.

DIVISION B: SOURCES OF LAW

§ I. CUSTOM. USAGE

(a) *Essential requisites of custom or usage, as law.* In the *Morocco* case, the Court reaffirmed the finding it had previously given in the *Asylum* case (see this *Year Book*, 27 (1950), pp. 17-18, § 2) as to the circumstances in which the existence of a custom or usage can be relied on as having given rise to a rule of law—namely, in particular, that it ‘is established in such a manner that it is binding on the other Party . . . in accordance with a constant and uniform usage practised by the States in question’.¹ After citing the relevant passage (*I.C.J.*, 1950, pp. 276-7) the Court went on (*I.C.J.*, 1952, p. 200):

‘In the present [i.e. *Morocco*] case, there has not been sufficient evidence to enable the Court to reach a conclusion that a right [on the part of the United States] to exercise consular jurisdiction founded upon custom or usage has been established in such a manner that it has become binding on Morocco.’²

(b) *Definition of ‘customary international law’.* In the *Fisheries* case, Judge Read (*I.C.J.*, 1951, p. 191) said that

‘Customary international law is the generalization of the practice of States.’

He went on to suggest that the essential element in the practice of States was their overt *actions*, rather than such things as claims, declarations, municipal legislation, &c. (*ibid.*):

‘This [i.e. the practice of States] cannot be established by citing cases where coastal States have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over trespassing foreign ships. Such claims may be important as starting points, which, if not challenged, may ripen into historic title in the course of time.’

‘The only convincing evidence of State practice [i.e. in regard to coastal waters] is to be found in seizures, where the coastal State asserts its sovereignty over the waters in question. . . .’

¹ In another passage in the same (*Asylum*) case, the Court referred to ‘constant and uniform usage, accepted as law . . .’ (*I.C.J.*, 1950, p. 277).

² Evidently in such a matter much depends on the interpretation given to the facts. In the *Morocco* case, the United States right to exercise consular jurisdiction in Morocco depended primarily on treaty and most-favoured-nation rights, but the United States also argued that a right based on usage and independent of treaty existed. The Court thought not, but the jointly dissenting Judges (Hackworth, Badawi, Carneiro and Rau) thought that an independent right based on usage did exist. The Court seems to have considered that where a treaty right exists, it forms the primary basis of the right in question, and so to speak ousts or precludes reliance on any other basis of right (in much the same way that in England, the executive can no longer rely on the prerogative power of the Crown for the exercise of a right that has come to be regulated by Act of Parliament, even though the right as so regulated is substantially the same as the former prerogative right). The fact that other States had capitulatory rights in Morocco founded not on treaty but on usage alone did not, in the Court’s view, cause United States rights to become customary rights. The dissenting Judges, on the other hand, thought not only that usage was a separate and independent basis of United States rights, but also that the rights based on usage alone, possessed by certain other States, reinforced this view, since the position of the United States could not be worse than that of those States merely because it had treaty rights—the point being that the treaty rights might be terminable, whereas those based on usage might not be.

While this point of view must probably not be pressed so far as to rule out the probative value, and the contribution to the formation of usage and custom, of State professions in their various forms (legislation, declarations, diplomatic statements, &c.), it is believed to be a sound principle that, in the long run, it is only the actions of States that build up practice, just as it is only practice ('constant and uniform', as the Court has said) that constitutes a usage or custom, and builds up eventually a rule of customary international law.

(c) *The consensual element in custom and usage.* In the *Morocco* case, the jointly dissenting Judges, after quoting the recital to the British Foreign Jurisdiction Act, 1890—'Whereas by treaty, capitulation, grant, usage, sufferance and other lawful means, Her Majesty the Queen has jurisdiction within divers foreign countries'—continued (*I.C.J.*, 1952, p. 220):

'Usage and sufferance are only different names for agreement by prolonged conduct, which may be no less binding than agreement by the written word.'

They therefore evidently considered that a custom or usage conferring legal rights was the result of a sort of tacit agreement between the States affected. It seems necessary to distinguish three cases:

i. Where a *general* rule of customary international law is built up by the common practice of States, although it may be a little unnecessary to have recourse to the notion of agreement (and a little difficult to detect it in what is often the uncoordinated, independent, if similar, action of States), it is probably true to say that consent is latent in the mutual tolerations that allow the practice to be built up at all; and actually patent in the eventual acceptance (even if tacit) of the practice, as constituting a binding rule of law. It makes no substantial difference whether the new rule emerges in regard to (in effect) a new topic on which international law has hitherto been silent, or as a change in existing law. (In writing on the law relating to submarine areas, Professor Lauterpacht has suggested (this *Year Book*, 27 (1950), p. 395) that the silence of, or absence of protest by, States can either be regarded as meaning that the new rule is not 'new' at all, i.e. is *accepted* by States as already being in general conformity with international law; or as being itself the source of the new legal right. In either case the consensual element is present.)

ii. Where a special right different from, and in principle contrary to, the ordinary rule of law applicable, is built up by a particular State or States through a process of prescription—leading to the emergence of a usage or customary or historic right in favour of such State or States—it has already been seen (*supra*, Division A, § 6 *passim*) that the element of consent, that is to say, acquiescence with full knowledge, on the part of other States is not only present, but necessary to the formation of the right.

iii. Special rights, i.e. such as would not exist under ordinary law, may, however, be acquired by one State, not as against the world in general (as under ii), but against another particular State, e.g. in its territory or waters or with reference to its vessels or nationals. This is the case to which the jointly dissenting Judges in the *Morocco* case were referring. While the element of consent may be more difficult to detect here, and may have been lacking at the origin of the matter, it is believed that if the right has developed into a legal right, this is because consent, in the form of acquiescence, was given or can be presumed.¹

§ 2. SO-CALLED LEGITIMATE INTERESTS. ECONOMIC INTERESTS

Despite certain pronouncements in the *Fisheries* case, it does not seem that the Court has sanctioned so-called legitimate, or economic, interests as being *per se* sources of law or of State rights. One aspect of this has been dealt with above (see Division A, § 4 (b)), where the question was whether a State could plead its legitimate interests (as it might attempt to plead its municipal law) as a ground absolving it from the performance of its international obligations, or as taking it out of the operation of a particular rule and creating an exception in its favour. It was shown that the Court could not be considered to have sanctioned such a doctrine, which would indeed be totally subversive of the rule of law in international relations. Judge McNair uttered an emphatic repudiation of the idea when he said (*I.C.J.*, 1951, p. 169):

‘That a State has a right to delimit its territorial waters in the manner required to protect its economic and other social interests . . . is a novelty to me.

‘In my opinion, the manipulation of the limits of territorial waters for the purpose of protecting economic and other social interests has no justification in law; moreover the approbation of such a practice would have a dangerous tendency in that it would encourage States to adopt a subjective appreciation of their rights instead of conforming to a common international standard.’

There may nevertheless be certain ways in which the concept of legitimate interests, such as economic interests, may play a part in the formation of a rule or right:

i. Legitimate interests may be the *inspiration*, motive power or force behind certain practices of States leading to the evolution of a customary

¹ Many strictures have been made about the capitulatory system. But it should be remembered that it was by no means so one-sided as it has been represented. It was really the indispensable condition that alone made possible trade, commerce and intercourse generally between countries of widely different civilizations and judicial and legal systems—to the benefit mutually of both parties. The existence of capitulatory systems also prevented the continual incidents that must have resulted from the application to foreigners of the local judicial system of the country, leading eventually either to the total withdrawal of foreign merchants and enterprises or, more probably, to the total subjugation and annexation of the country.

rule of general international law. But of course the *source* of the eventual rule is the custom or practice: the interests involved are only the reason for it.

ii. Similarly, State interest may be the reason or motive for the building up by prescriptive means of a historic title or special right not normally accorded by law. But again, it is the usage or custom, acquiesced in by other States, that constitutes the legal foundation or source of the right. This seems to have been the conception of the Court in the two following passages from the *Fisheries* case (*I.C.J.*, 1951):

‘Finally, there is one consideration not to be overlooked . . . that of certain economic interests peculiar to a region, the reality and importance of which *are clearly evidenced by a long usage*’ (at p. 133).

‘Such rights, *founded on the vital needs of the population and attested by very ancient and peaceful usage*, may legitimately be taken into account [in drawing a particular base-line]’ (at p. 142).¹

iii. When the legitimacy of an act depends as a matter of law on its reasonableness, the existence of special interests such as economic ones may be a justificatory factor, or at any rate a factor to be taken into account. In the *Fisheries* case, one of the criteria laid down by the Court for testing the legitimacy of the Norwegian fishery limits and of given base-lines was their reasonableness. It is in the light of this consideration that the following passage from the Judgment must be understood (*I.C.J.*, 1951, p. 128):

‘In these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing.

‘Such are the realities which must be borne in mind in appraising the validity of the . . . contention that the limits of the Norwegian fisheries zone . . . are contrary to international law.’

¹ (Author’s italics.) The rights referred to in the second of these passages were ‘traditional rights reserved to the inhabitants of the Kingdom over fishing grounds included in the 1935 delimitation’. It seems clear, therefore, that it was the usage founded on (i.e. motivated by) ‘the vital needs of the population’ that was given as the legal source of the rights concerned. The vital needs merely gave rise to the usage that led to the rights, and justified the drawing of the particular base-line here involved. (This was the LoppHAVET line, forty-four miles in length.) Equally, in the first passage it is clearly the usage (of carrying on certain fisheries) that evidences the existence of economic interests in the region. But it is still the usage that confers the legal right. The economic interests merely explain why this came about.

THE INTERNATIONAL CHARACTER OF THE SECRETARIAT OF THE UNITED NATIONS

By S. M. SCHWEBEL

I. *The League of Nations and the Charter of the United Nations*

THE Secretariat of the United Nations was established as a body exclusively international in its responsibilities as a matter of course. Article 100 of the Charter is couched in emphatic language admitting of no qualification:

'1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

'2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.'

The concept of a secretariat which, as the Charter prescribes, shall be of 'exclusively international character' is relatively new. The authors of the Covenant of the League of Nations did not specify that the League Secretariat was to consist of anything more than a permanent grouping of national contingents. It was Sir Eric Drummond, the first Secretary-General, who made the epochal decision that the League Secretariat should be genuinely international.² However, the part of the Secretariat in the United Nations as the expression of an international outlook surpasses in significance the part which it played in the League. For the Secretary-General of the United Nations is endowed with political powers which were withheld from his League predecessors.³

1. *The League experience*

The experiment of the League of Nations in international administration was, on the whole, notably successful.⁴ The initiative of Sir Eric

¹ This is a classic provision, which is substantially duplicated in the constitutions of the Specialized Agencies. See the Constitution of the International Labour Organization (Article 9, paragraphs 4 and 5), the Articles of Agreement of the International Monetary Fund (Article 12, paragraph 4 (c)), the Constitution of the World Health Organization (Article 37), the Constitution of the Food and Agriculture Organization of the United Nations (Article VIII, paragraph 2), the Constitution of the International Trade Organization (Article 88, paragraphs 1, 2, and 3), and others.

² See Walters, *A History of the League of Nations* (1952), vol. i, pp. 75-76 (hereinafter cited as *History*); the same, *Administrative Problems of International Organization* (1941), p. 16 (hereinafter cited as *Administrative Problems*).

³ Walters, *History*, vol. i, p. 76. See also Schwebel, *The Secretary-General of the United Nations: His Political Powers and Practice* (1952), pp. 10-11, 230-1; the same, 'The Origins and Development of Article 99 of the Charter', in this *Year Book*, 28 (1951), pp. 371-2.

⁴ 'The Secretariat', writes Lord Cecil, 'was a creation very largely of Drummond's and,

Drummond in creating the Secretariat as an international organism was readily accepted by the States Members as natural and sound. In 1920 the League Council adopted the Balfour Report which declared that 'the members of the Secretariat once appointed are no longer the servants of the country of which they are citizens, but become for the time being the servants only of the League of Nations. . . . The members of the staff carry out . . . not national but international duties.'¹ The Noblemaire Report, adopted by the Assembly in the following year, likewise approved the Secretary-General's concept of the international civil service.² That concept was challenged, cautiously, in 1930 by the Minority Report of the Committee of Thirteen, but the majority upheld it,³ while conceding the value of the Secretary-General engaging a small proportion of the staff whose task it would be to interpret, though not to represent, the policies of their respective States.⁴ The Staff Regulations were at that time amended to read:

'The officials of the Secretariat of the League of Nations are exclusively international officials and their duties are not national, but international. By accepting

as far as I can tell, it was an extremely able body. It consisted of individuals who gave up positions in their own country of often considerable value because of their great interest in the work of the League. They were extraordinarily non-national in the sense that they were quite impartial and in that respect Drummond gave a most excellent example. I often found on discussing with colleagues who represented other countries in the League that if there was any difficulty they were always ready to accept the advice of Drummond as being both able and impartial. Drummond always regarded himself as the assistant and servant of the League and was quite ready to assist with his experience and knowledge any national representative who asked for it. It would, of course, be absurd to suggest that all the members of the Secretariat were equal in ability but I do think, as far as my knowledge is concerned, that they were all perfectly impartial and that they did not allow the fact of their nationality to influence unduly their action in the League.' (Letter to the author of 6 May 1953.)

See Ranshofen-Wertheimer, *The International Secretariat: A Great Experiment in International Administration* (1945), *passim*; Walters, *History*, vol. i, pp. 75-80, vol. ii, pp. 556-60; the same, *Administrative Problems*, *passim*; Royal Institute of International Affairs, *The International Secretariat of the Future: Lessons from Experience by a Group of Former Officials of the League of Nations* (1944), *passim*; Drummond, 'The Secretariat of the League of Nations', in *Public Administration*, 9 (1931), *passim*; Phelan, *Yes and Albert Thomas* (1936), *passim*; the same, 'The New International Civil Service', in *Foreign Affairs*, 1932-3, *passim*; Boudreau, 'International Civil Service—The Secretariat of the League of Nations', in *Pioneers in World Order*, 1944 (ed. by Davis), *passim*; Carnegie Endowment for International Peace, *Proceedings of the Exploratory Conference on the Experience of the League of Nations Secretariat, 1942*, and *Proceedings of the Conference on Experience in International Administration, 1943*, *passim*.

¹ 'Staff of the Secretariat: Report Presented by the British Representative, Mr. A. J. Balfour', in *Official Journal*, 1920, vol. i, pp. 137-9. See Krabbe, 'Le Secrétariat Général de la Société des Nations et son activité', in Rask-Orstedfonden, *Les Origines et l'œuvre de la Société des Nations* (1924), vol. ii, p. 268; Ranshofen-Wertheimer, *op. cit.*, pp. 26-27, 81; and Calderwood, 'The Higher Direction of the League Secretariat', in *Arnold Foundation Studies in Public Affairs*, vol. 5, No. 3, pp. 6-7.

² *Organisation of the Secretariat and of the International Labour Office*, L. N. Docs. C. 424, M. 305, 1921, X. and A. 140 (a), 1921. See Calderwood, *loc. cit.*, pp. 8-14, and Ranshofen-Wertheimer, *op. cit.*, p. 27.

³ Committee of Enquiry on the Organisation of the Secretariat . . . , *Report of the Committee*, L. N. Doc. A. 16, 1930.

⁴ The staff, the majority proposed, should consist 'of two elements—one stable and tending towards that type of "international man" . . . committed to the strictest and most scrupulous impartiality in examining and solving all problems submitted to it; while the other would be

appointment, they pledge themselves to discharge their functions and to regulate their conduct with the interests of the League alone in view. They are subject to the authority of the Secretary-General, and are responsible to him in the exercise of their functions. . . . They may not seek or receive instructions from any Government or other authority external to the Secretariat of the League of Nations.¹

While, however, both official policy and dominant practice conformed to the concept of the Secretariat as being exclusively international in its responsibilities, there were exceptions which derogated from the rule. The Under-Secretaries-General created with some the impression of national representatives rather than international officials.² At the Secretariat's lowest ebb, in 1940, the second Secretary-General went so far as to pledge privately his allegiance to Marshal Petain, expressing willingness to demonstrate that allegiance by resigning if the Marshal so wished.³

Italy appears to have been the first Member to break *de facto* with the principle, to which it had earlier subscribed, of the international responsibility of the Secretariat, and probably is the only State which may be said to have withdrawn support from that principle as a matter of law. An Italian Law of 16 June 1927 required Italian nationals who enter the service of another Government or of a public international institution to obtain the authorization of the Ministry of Foreign Affairs or of a competent diplomatic authority, and to relinquish such service upon the order of the Government.⁴ It was suggested that this regulation was contrary to the obligations of Italy under Article 6 of the Covenant.⁵ It violated the Council and Assembly resolutions approving the Balfour and Noblemaire Reports, as well as the Staff Regulations. An Italian national who resigned from the

temporary and specialized, freer in judgment and able so to modify solutions as to make them acceptable to the various nations'. *Official Journal*, Special Supplement No. 84, p. 220. See Ranshofen-Wertheimer, op. cit., pp. 28-31; and Calderwood, loc. cit., pp. 16-21.

¹ *Staff Regulations*, 1933, Article 1. A committee of which the first Secretary-General was chairman later described this provision as one of 'strict international loyalty', and affirmed that 'the staff regulations were based on this premise throughout' (Royal Institute of International Affairs, *The International Secretariat of the Future*, p. 19).

² See Ranshofen-Wertheimer, op. cit., pp. 56-60. *The International Secretariat of the Future* concedes that 'the existence of Under-Secretaries-General was a frank compromise between political necessity and administrative efficiency', and indicates that the compromise may have been in the interests of the Secretariat's influence (at pp. 28, 30-31). In support of this latter view see Salter, 'The International Character of the League Secretariat', in *The United States of Europe and Other Papers*, 1933, pp. 127-36. For a comparison of the status of the Assistant Secretaries-General of the United Nations see Schwebel, op. cit., pp. 56-59, 131-2, 166, and 246, n. 9.

³ See Schwebel, op. cit., p. 221.

⁴ *Raccolta delle Leggi d'Italia*, 1927, vol. vi, p. 5932, as cited by Hudson, *The Permanent Court of International Justice, 1920-1942* (1943), p. 319, n. 22. The sanctions which the Law prescribed for its violation are severe: a fine of not more than 5,000 lire (it should be recalled that this Law was adopted in 1927), a prison sentence of not more than one year, and loss of civic prerogatives and rights of citizenship.

⁵ See Basdevant, *Les Fonctionnaires internationaux* (1931), p. 154, presumably referring to paragraph 3 of that Article: 'The secretaries and staff of the Secretariat shall be appointed by the Council with the approval of the majority of the Assembly.'

Secretariat pursuant to orders issued thereunder, at least after the amendment of the Staff Regulations by the Eleventh Assembly, was acting contrary to Article 1 of the Regulations, in particular the clause which prescribed that officials of the Secretariat 'may not seek or receive instructions from any Government . . .'. The Italian answer to the criticisms of the Law was that it was within the area of Italian sovereignty and was designed to prevent elements disloyal to the régime from joining the Secretariat.¹

The League experience has a further relevance to the personnel problems facing the United Nations. By an early League resolution, members of the staff were given the right to appeal against their dismissal to the Council.² In 1925 a former member of the Secretariat invoked this procedure,³ and this led the Council to appoint a commission of jurists, whose conclusions it resolved in advance to adopt. The Commission took the view that a contract between a person and the Secretary-General 'must be considered mainly in the light of the principles of public law and administrative legislation. . . . Relations connected with public employment are always governed by the exigencies of the public interest, to which the private and personal interests of the officials must necessarily give way.' Thus, 'the administration must always retain discretionary powers, as otherwise it could not ensure the development of these relations with due regard for the recognised public requirements for the satisfaction of which they were constituted'. Officials have their rights, especially economic, but these are 'subject to the rights of the administration'.

'The same principles [the Commission held] must undoubtedly be applied to the legal relations between the Secretary-General of the League of Nations and the officials of the Secretariat. If the relations connected with employment in individual States must be subject to the requirements of the public interest, to which they owe their existence, the same must *a fortiori* be true in the case of the League of Nations, which is called upon to satisfy requirements which are much more complicated in that they are international, and which, in consequence, must exercise a still wider discretionary power in respect of the engagement, retention and dismissal of officials.'⁴

¹ See Basdevant, *op. cit.*, p. 154.

² ' . . . all Members of the Secretariat and of the International Labour Office appointed for a period of five years or more by the Secretary-General or the Director of the International Labour Office shall, in case of dismissal, have the right of appeal to the Council or to the Governing Body . . . as the case may be.' (*Records of the First Assembly, Plenary Meetings, 1920*, pp. 663-4.)

³ See Ranshofen-Wertheimer, *op. cit.*, pp. 256-62.

⁴ *Official Journal*, 1925, p. 1443. The Commission's report, which awarded an indemnity to the claimant, was adopted by the Council without discussion. For a critical view of the report see Kelsen, *The Law of the United Nations* (1950), p. 318. The prospect of officials appealing regularly to the Council led to the creation of the Administrative Tribunal (for the Statute and Rules of which see Hudson, *International Legislation*, vol. i, pp. 212-23). The Tribunal had rendered twenty-one judgments by 1939, granting affirmative relief in eight cases. Hudson, writing of these, declares that the Tribunal's 'jurisprudence did not establish an extensive body of case-law'. (Hudson, *International Tribunals, Past and Future* (1944), pp. 220-2.) In 1946 the Tribunal gave sixteen judgments, upholding the claims of twelve former members of the League Secretariat

The League Administration was not unaware that a mechanism which was either arbitrary or harsh in its personnel policies could not expect to attract the devotion and energies of qualified officials. 'Ability cannot be enlisted, nor loyalty and morale maintained, unless the usual civil service principles of permanence, promotion for merit and pension upon retirement are adopted.'¹ Indeed, members of the Secretariat were recognized by the Staff Regulations to have certain 'acquired rights',² which, while not assuring tenure, did strengthen their claims to material compensation for dismissal or lesser impairments of their status. The very existence of the Administrative Tribunal imposed a check upon the Secretary-General. Moreover, the Secretary-General's ultimate authority was qualified by his responsibility to the League Assembly and Council. But, essentially, the limit to the Secretary-General's discretion in his staff policies was his own sense of propriety. The rules governing the organization of the service, as contrasted with the material rights of the officials, kept the actual power in his hands.³ That power does not seem to have been ordinarily abused.⁴

The League experiment 'worked well', a group of former Secretariat officials under the chairmanship of the first Secretary-General concluded, 'until the League became the direct object first of subtle, then of open, sabotage. Whatever their final judgment of the League, observers agree that the concept of international loyalty is practicable, and we can affirm on empirical evidence that an administration based on international loyalty—to the organization in general and its secretariat in particular—can be highly efficient. Experience shows that a spirit of international loyalty among public servants can be maintained in practice. It shows also that maintenance of such a spirit is an essential factor in the activity of an international service, since this alone can ensure to it that confidence without which it cannot function as it ought.'⁵

and one former member of the International Labour Office who maintained that their 'acquired rights' had been violated by the Secretary-General's and Director-General's interpretation of the resolution of the League Assembly of 1939 which amended the Staff Regulations so as to reduce the period of notice of termination of employment from six months to one month and to spread the payment of termination indemnities over four years. The Acting Secretary-General, who had contested the Tribunal's jurisdiction in these cases, declined to execute the judgments. The Assembly supported him on grounds of jurisdiction and substance, in a discussion which is of great interest for the questions of the relations between the Assembly and the Tribunal, of acquired rights, and of the nature of the law governing the international civil servant. (See *Records of the 20th (Conclusion) & 21st Session of the Assembly, Official Journal, 1946*, pp. 245-9, 130-3, 162, 123, and *Mayras v. The Secretary-General of the League of Nations: Annual Digest, 1946*, Case No. 91.)

¹ *The International Secretariat of the Future*, p. 24.

² See Articles 78 and 80, and *supra*, p. 74, n. 4, and *infra*, p. 94, n. 1.

³ See Cagne, *Le Secrétariat Général de la Société des Nations* (1936), p. 43.

⁴ The second Secretary-General was in 1939 entrusted by the Assembly with extraordinary powers, which he wielded in a manner provocative of severe criticism. It has been suggested that when staff, inevitably, had to be reduced, he was influenced by political motives. See Ranshofen-Wertheimer, *op. cit.*, pp. 373-81, and Schwebel, *op. cit.*, pp. 215-24.

⁵ *The International Secretariat of the Future*, pp. 19-20.

What is this spirit of international loyalty? '... [It] is the conviction that the highest interests of one's own country are served best by the promotion of security and welfare everywhere, and the steadfast maintenance of that conviction without regard to changing circumstances. It is breadth of international outlook. . . .'¹ Sir Eric Drummond and his colleagues cite a characteristically perceptive definition of 'the distinctively international outlook' by a writer of authority:

'A lack of attachment to any one country does not constitute an international outlook. A superior indifference to the emotions and prejudices of those whose world is bounded by the frontiers of a single state does not constitute an international outlook. A blurred indistinctness of attitude towards all questions, proceeding from a freedom of prejudice born of lack of vitality, does not constitute an international outlook. The international outlook required of the international civil servant is an awareness made instinctive by habit of the needs, emotions, and prejudices of the peoples of differently-circumstanced countries, as they are felt and expressed by the peoples concerned, accompanied by a capacity for weighing these frequently imponderable elements in a judicial manner before reaching any decision to which they are relevant.'²

Thus from the League experience the founders of the United Nations were able to draw a formula for international loyalty which had been tested in practice. That test at one and the same time had demonstrated the validity of the concept of the internationally-responsible secretariat, and the difficulties of applying that concept in a world where the values of national loyalty remain predominant and assertive.

2. *The Charter of the United Nations*

The present Article 100 of the Charter was not included in the Dumbarton Oaks draft. It was inserted at San Francisco at the instance of three Sponsoring Powers³—Canada,⁴ New Zealand,⁵ and Uruguay⁶—and was adopted unanimously. It would, it was agreed, 'strengthen the position of the Secretariat'.⁷ While the discussion of Article 100 was of a cursory nature, it sufficed to make clear that no restrictive interpretation of the international allegiance which would be required thereunder was anticipated by the signatories of the treaty at San Francisco. On the contrary, it was foreseen that the national and international loyalties of the members of the Secretariat might clash. Nothing in the record of the discussions of the Conference gives the impression that it was intended, in such an event,

¹ *The International Secretariat of the Future*, p. 18.

² Jenks, 'Some Problems of an International Civil Service', in *Public Administration Review*, 3 (1943), No. 2, p. 95. See also Aghnides, 'Standards of Conduct of the International Civil Servant', in *Revue internationale des sciences administratives*, 19 (1953), No. 1, p. 182, and Langrod, 'Les Problèmes fondamentaux de la fonction publique internationale', *ibid.*, pp. 33-40.

³ United Nations Conference on International Organization (U.N.C.I.O.), *Documents*, vol. 3, pp. 627-8.

⁴ *Ibid.*, pp. 594-5.

⁶ *Ibid.*, p. 37.

⁵ *Ibid.*, pp. 490-1.

⁷ *Ibid.*, vol. 7, p. 393.

that the international responsibilities of Secretariat officials should give way.

Two questions were considered; whether Article 100 'covered the risk which might be faced by a member of the Secretariat as a result of taking the oath of allegiance to the Organization'; and whether it was adequate to protect a Secretariat member 'who participated in the preparation of military plans for possible use against his own State'.¹ With respect to the latter problem, it was pointed out that if the official were to become aware of such military plans, he might be liable to heavy penalties under the law of his own State for failure to reveal them to his Government. In response to the first question, it was stated that 'the experience of the League of Nations demonstrated that there was no practical difficulty in this matter, except in the case of the Fascist states'.² The second question, while seen as 'highly important', could not, it was felt, be properly treated in Chapter XV of the Charter, but was referred to another committee of the Conference for such action as it might deem necessary—in order, apparently, to obviate the suggested danger to Secretariat members.³

The San Francisco Conference further provided, in Article 105 of the Charter, that '... officials of the Organization shall ... enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization'.⁴ (The Covenant was more liberal in this respect, Article 7, paragraph 4, providing that '... officials of

¹ U.N.C.I.O., *Documents*, vol. 7, p. 394.

² *Ibid.* The Committee appears to have assumed that Fascist States would not be Members of the Organization, and that their nationals would not be employed in the Secretariat. It may be noted that the Preparatory Commission recommended, and the General Assembly agreed, that 'The Secretary-General should take the necessary steps to ensure that no persons who have discredited themselves by their activities or connections with Fascism or Nazism shall be appointed to the Secretariat'. (*Report of the Preparatory Commission*, p. 92; *Resolutions Adopted by the General Assembly during the First Part of its First Session from 10 January to 14 February 1946*, p. 15.) This ban apparently was meant to apply to persons of the proscribed associations irrespective of their nationality. A rule expressive of the Assembly's injunction was included at first in the Staff Rules which the Secretary-General issued in implementation of the Staff Regulations adopted by the Assembly, but this rule was subsequently deleted.

³ U.N.C.I.O., *Documents*, vol. 7, p. 394. There is no recorded indication that the Committee to which this (and also the first question) was referred considered or took further action. But in support of the above interpretation see Kelsen, *op. cit.*, pp. 307–8, and Goodrich and Hambro, *The Charter of the United Nations* (1949), p. 505.

⁴ '1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

'2. Representatives of Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

'3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.' (See also Article 104.)

See Hill, *Immunities and Privileges of International Officials* (1947), pp. 101–19; Preuss in *American Journal of International Law*, 41 (1947); Parry, 'International Government and Diplomatic Privileges', in *Modern Law Review*, 10 (1947); King, *The Privileges and Immunities of the Personnel of International Organizations* (1949); and Kelsen, *op. cit.*, pp. 314–19, 337–8.

the League when engaged in the business of the League shall enjoy diplomatic privileges and immunities'.¹ Pursuant to paragraph 3 of Article 105, the General Assembly adopted the General Convention on the Privileges and Immunities of the United Nations,² and the Convention on the Privileges and Immunities of the Specialized Agencies was subsequently adopted by the Assembly as a measure for co-ordinating the privileges and immunities of the Agencies with those of the Organization.³ The United States has ratified neither Convention. Its International Organizations Immunities Act, as applied to the United Nations, accords the Organization and its officials some, but not all, of the privileges set forth in the General Convention.⁴ The Headquarters Agreement between the United Nations and the United States, which is complementary to the Convention, assures

¹ The literature relating to the privileges and immunities of the League and its officials is extensive. See, *inter alia*, Hammarskjöld, 'Les Immunités des personnes investies de fonctions internationales', in *Hague Academy, Recueil des Cours*, 1936 (ii), especially pp. 117, 119, 161-2, 167-80, 200-1; the same, 'Les Immunités des personnes investies de fonctions d'intérêt international', in *Revue de droit international et de législation comparée*, 1935, No. 1, pp. 6 ff.; Secrétan, *Les Immunités diplomatiques des représentants des états membres et des agents de la Société des Nations* (1928); the same, 'Les Privilèges et immunités diplomatiques des agents de la Société des Nations', in *Revue de droit international privé et de droit pénal international*, 20 (1925), pp. 1 ff.; and 'The Independence Granted to Agents of the International Community in their Relations with National Public Authorities', in this *Year Book*, 16 (1935), pp. 56 ff.; Preuss, 'Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest', in *American Journal of International Law*, 25 (1931), pp. 694 ff.; Rey, 'Les Immunités des fonctionnaires internationaux', in *Revue de droit international privé et de droit pénal international*, 23 (1928), pp. 432 ff.; Gascon y Marin, 'Les Fonctionnaires internationaux', in *Recueil des Cours*, 1932 (iii); Hurst, 'Diplomatic Immunities—Modern Developments', in this *Year Book*, 9 (1929); Martin, *La Situation juridique des agents internationaux* (1926); Secrétan, 'Les Privilèges et immunités diplomatiques des agents de la S.D.N.', in *Revue de droit international privé*, 1925; Basdevant, *op. cit.*, pp. 292-320; and Hill, *op. cit.*

² See *Resolutions Adopted by the General Assembly during the First Part of its First Session from 10 January to 14 February 1946*, pp. 25 ff. See also Kunz, 'Privileges and Immunities of International Organizations', in *American Journal of International Law*, 41 (1947); Brandon, 'United Nations Laissez Passer', in this *Year Book*, 27 (1950); and Crosswell, *Protection of International Personnel Abroad* (1952).

³ See *Convention on the Privileges and Immunities of the Specialized Agencies* (adopted by the General Assembly on 21 November 1947) and *Final Texts of The Annexes* (as approved by the Specialized Agencies by 29 December 1951), U.N. Doc. ST/LEG/4, March 1953. See also Jessup, 'Status of the I.L.O.: Privileges and Immunities of their Officials', in *American Journal of International Law*, 38 (1944); and Chen, 'The Legal Status, Privileges and Immunities of the Specialized Agencies', *ibid.* 42 (1948).

⁴ (1945) 39 Stat. 669, 22 U.S.C.A., s. 288. See Preuss, 'The International Organizations Immunities Act', in *American Journal of International Law*, 40 (1946), pp. 332-45; and *Report of the Secretary-General on Personnel Policy*, U.N. Doc. A/2364, 30 January 1953, p. 14. The Act is based on the principle of nationality discrimination, its benefits being extended to aliens only, except in the case of immunity for official acts. It reflects an early concern for United States security (see Preuss, *loc. cit.*, pp. 335, 337, 339). See also Liang, 'The Legal Status of the United Nations in the United States', in *International Law Quarterly*, 2 (1948); Preuss in *American Journal of International Law*, 41 (1947); *Westchester County v. Ranallo*, 67 N.Y.S. (2nd), 31, noted in *Virginia Law Review*, 33 (1947), and in *New York Law School Quarterly Review*, 22 (1947); *United States v. Coplon*, 84 F. Supp. 472; Spence, 'Jurisdictional Immunity of United Nations Employees: The Gubitchev Case', in *Michigan Law Review*, 47 (1949); *United States v. Keeney*, 111 F. Supp. 233; 'Privileges and Immunities Accorded by the United States to the United Nations', in *Minnesota Law Review*, 34 (1950); and Crosswell, *op. cit.*

the United Nations further privileges.¹ The effect of Article 105 and its ancillary treaties is evidently to reinforce the independence of the Secretariat.

The exclusively international responsibilities of the Secretariat which are prescribed by Article 100 and buttressed by Article 105 are rooted in the exclusively international process of appointment of its members. Article 101 makes it clear that the choice of staff is solely the province of 'the Secretary-General under regulations established by the General Assembly'.² Governments have no part in the choice of personnel, and the factors which Article 101 lists as governing the employment of the staff do not include governmental approbation. 'The intent . . . at San Francisco', the Secretary of State concluded in his Report to the President, 'was to make it perfectly clear that the nationals of member states serving on the staff of the Secretariat could not, in any sense of the word, be considered as agents of their governments.'³ The Preparatory Commission was careful to uphold this view. The Yugoslav delegation proposed that the appointment of officials of the Secretariat 'should be made with the consent of the Member Government of which the candidate is a national'.⁴ The Governments concerned, the Yugoslav Delegate maintained, were in the best position to assess the qualifications and capacities of prospective candidates. The United Nations was 'an inter-governmental Organisation'; persons appointed to the Secretariat 'must command the confidence of their governments if they were to be of real value to it'. Yet once the officials were appointed, 'the exclusively international character of their responsibilities would

¹ Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, *United Nations Treaty Series*, vol. xi, p. 11. See Brandon, 'The Legal Status of the Premises of the United Nations', in this *Year Book*, 28 (1951), pp. 90 ff., and Liang, loc. cit. The United States affirmed on 9 April 1953 that the Joint Resolution of Congress which authorized the President to bring the Headquarters Agreement into effect on the part of the United States, and the note of its Representative of 21 November 1947 bringing the Agreement into effect, were subject to a reservation respecting an American 'right to safeguard its security'. The Secretary-General of the United Nations declined to accept the contention of the United States that in fact a reservation to the Agreement exists (see the Memorandum by the Legal Department on the Admission of Representatives of Non-Governmental Organizations Enjoying Consultative Status, U.N. Doc. E/2397, 10 April 1953). The dispute is being negotiated pursuant to Section 21 of the Agreement (see U.N. Docs. E/2492 and E/2501).

² Article 101 reads as follows:

'1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.

'2. Appropriate staffs shall be permanently assigned to . . . organs of the United Nations. . . .

'3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.'

³ *Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State*: Department of State Publication 2349, 1945, p. 150.

⁴ U.N. Doc. PC/AC/54, 18 December 1945.

naturally be respected and no government would seek to influence them' in their discharge.¹

A 'large majority'² opposed the Yugoslav proposal. In their view, it impaired the exclusive responsibility of the Secretary-General for the appointment of staff under Article 101 of the Charter. It would, they held, 'threaten the freedom, independence and truly international character of the Secretariat' and 'defeat the spirit as well as infringe the letter of Article 100'.³ There was a problem to be faced, but the Yugoslav plan would accentuate rather than remedy it. It was 'common sense that the staff should, as far as possible, be acceptable to the Member Governments, and also that the Secretary-General would often require information regarding candidates from governments or private bodies, but it would be extremely undesirable to write into the text anything which would give national governments particular rights in this respect, or permit political pressure upon the Secretary-General'. The Yugoslav proposal was therefore defeated, the Committee deciding rather to 'rely on the Secretary-General's discretion and good sense'.⁴ The Secretary-General was later to commend the Preparatory Commission for this 'fundamental decision affirming the international character and independence of the Secretariat',⁵ which, it should be noted, the General Assembly adopted as its own.⁶

3. *The case of reparation for injuries to officials of the United Nations*

Perhaps the most significant affirmation of the principle of the independence of officials of the United Nations has come from the International Court of Justice, which had occasion to construe Article 100 in the course of its Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations*. The Court unanimously decided that the United Nations as an Organization has international legal personality, with the result that, in the event of an agent of the United Nations suffering injury in the performance of his duties in circumstances involving the responsibility of a State, the Organization enjoys the capacity to bring an international claim against the responsible State with a view to obtaining the reparation due in respect of the damage caused to the United Nations. The Court further decided, by eleven votes to four, that the United Nations has the capacity to bring an international claim against the State respon-

¹ Preparatory Commission, Committee 6: Administrative and Budgetary, *Summary Record of Meetings*, 19 and 20 December 1945, 22nd and 23rd meetings, U.N. Doc. PC/AB/66.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ *Report of the Secretary-General on Personnel Policy*, U.N. Doc. A/2364, 30 January 1953, p. 14.

⁶ *Resolutions adopted by the General Assembly during the First Part of its First Session, &c.*, p. 14. By this Resolution the Assembly confirmed the Secretary-General's exclusive power of appointment and assigned no qualifying role to the States Members.

sible with a view to obtaining the reparation due in respect of the damage caused to the victim or to his successors in interest. Lastly, it held that such a claim could be brought by the Organization even against the State of which the victim was a national.¹

In order to be able to reach these decisions the Court felt impelled to undertake a re-examination of the traditional rule of nationality of claims. That rule, the Court pointed out, rests on two bases. The first is that the defendant State has broken an obligation towards the plaintiff State in respect of its nationals. The second is that only the party to whom the international obligation is due can bring a claim in respect of the breach. 'This is precisely what happens', the Court held, 'when the Organization, in bringing a claim for damage suffered by its agent, does so by invoking the breach of an obligation towards itself. Thus, the rule of the nationality of claims affords no reason against recognizing that the Organization has the right to bring a claim for the damage [to the victim or to his successors in interest]. On the contrary, the principle underlying this rule leads to the recognition of this capacity as belonging to the Organization, when the Organization invokes, as the ground of its claim, a breach of an obligation towards itself.'² The Court attached importance to uttering a warning against undue generalization of its reasoning: 'It is not possible, by a strained use of the concept of allegiance, to assimilate the legal bond which exists, under Article 100 of the Charter, between the Organization on the one hand, and the Secretary-General and the staff on the other, to the bond of nationality existing between a State and its nationals.'³ Here the Court would seem to have taken a step backward, in the classic tradition,⁴ *pour mieux sauter*.⁵ It pointed out that the functions of the Organization

¹ *I.C.J. Reports*, 1949, pp. 174, 187. The latter decision, with respect to the reconciliation of the claims of the Organization with those of the State of which the victim is a national, was made by ten votes to five.

² *Ibid.*, p. 182.

³ *Ibid.*

⁴ The Court usually made 'courteous obeisance to the tradition of State sovereignty' while actually giving a 'restrictive interpretation' of its claims (Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), p. 89).

⁵ An interpretation which finds support in the dissenting Opinion of Judge Hackworth: 'International law on this subject is well settled, and any attempt to engraft upon it, save by international compact, a theory, based upon supposed analogy, that organizations, not States and hence having no nationals, may act as if they were States and had nationals, is, in my opinion, unwarranted.' (*I.C.J. Reports*, 1949, p. 203; see also pp. 198-9.)

This is not to say, of course, that an unreserved equation between the bond of Article 100 and the bond of nationality is juridically valid, and the Court's care in this matter seems fully justified. The Court, moreover, could not put itself in the position of relying upon Article 100 alone, since its definition of 'agent' is considerably broader than that of a member of the Secretariat (*ibid.*, p. 177). One may say, however, that thereby the Court's emphasis upon the independent status of the Organization's agents applies *a fortiori* to members of the Secretariat, for the latter's international ties clearly are stronger than those of a national delegate or an expert serving as the Organization's agent *ad hoc* (see the individual Opinion of Judge Azevedo, *ibid.*, pp. 194-5).

necessitate entrusting agents with hazardous missions in disturbed parts of the world. Both to ensure the efficient and 'independent'¹ performance of these missions and to afford support to its agents, the Organization must provide them with adequate protection.

'In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization (save of course for the more direct and immediate protection due from the State in whose territory he may be). In particular, he should not have to rely on the protection of his own State. If he had to rely on that State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter. And lastly, it is essential that—whether the agent belongs to a powerful or to a weak State; to one more affected or less affected by the complications of international life; to one in sympathy or not in sympathy with the mission of the agent—he should know that in the performance of his duties he is under the protection of the Organization. This assurance is even more necessary when the agent is stateless.'²

The breadth of the Court's construction of Article 100 is instructive. The Court was prepared to hold, as in fact it did, that in the relatively unlikely event of an agent of the Organization being injured in the course of his duties in circumstances involving the responsibility of a State, or, rather, in the contingency of the agent's anticipating the possibility of the occurrence of such an event, his independence might be compromised unless he were able to rely upon the very limited protection afforded by the presentation of a monetary claim *post facto*, not by his State, but rather by the Organization. This attitude of the Court is of importance for its possible approach to a less indirect encroachment upon Article 100.³

¹ *I.C.J. Reports*, 1949, p. 183.

² *Ibid.*, pp. 183-4.

³ See the dissenting Opinions of Judge Hackworth (*ibid.*, pp. 199-201) and Judge Badawi Pasha (pp. 209-11). Judge Hackworth stated that the Court's view that, if the employee had to rely on the protection of his own State, his independence might be compromised, contrary to the intention of Article 100 of the Charter, is a 'strange argument'.

But, in support of the Court's broad construction of Article 100, see the interventions before the Court by Counsel for the Secretary-General and by the Second Legal Adviser to the British Foreign Office, as reported in Liang, 'Reparations for Injuries Suffered in the Service of the United Nations', in *American Journal of International Law*, 43 (1949), pp. 460-7 (and see Wright, 'The Jural Personality of the United Nations': *ibid.*, pp. 509 ff.).

Mr. Feller and Mr. Fitzmaurice may be said to have gone beyond the position of the Court. The former suggested that, in the situation at bar, the nexus of nationality had been replaced by the nexus of official status and official duties. If the needs of the international community require the rule that a State may demand reparation for its injured national, they equally demand, the late Counsel for the Secretary-General argued, that the United Nations may require reparation for its injured agent. The British representative took the view that the Organization would have a right to protect its servants as does a State its nationals, if a relationship between the former analogous to nationality were found to exist. The United Kingdom found such a relationship by reference to Article 100. Its representative stressed the importance of the Organization and its servants being free from any limitations deriving from considerations of nationality.

II. *The practice of the United Nations*

1. *Subversive activities in the United States of America and cognate problems*

The principle of the exclusively international responsibility of the Secretariat has been more troubled in its application than in its conception. The first Secretary-General stated on one occasion that he successfully resisted 'strong pressures . . . from many quarters to appoint or replace Secretariat officials'.¹ Procedures for the international recruitment of staff, the Secretary-General reported to the General Assembly in March 1953, were 'working fairly well in most Member countries, with the notable exception of the Soviet Union'.² These procedures as a rule have involved governmental assistance in scrutinizing the character and record of applicants and members of the staff. Indeed, most Governments have, at the Secretary-General's request and otherwise, given such assistance, since 'the United Nations does not—and clearly cannot—have all the necessary facilities for personnel selection that are at the disposal of national governments'.³

The United States at first declined to provide aid of this kind, on the ground that it did not wish to appear in any way to influence the Secretary-General in his choice of personnel.⁴ In 1949 the United States authorities

¹ United Nations, General Assembly, Seventh Session, *Official Records*, 413th Plenary Meeting, 10 March 1953, A/PV. 413, p. 534.

² *Ibid.*, p. 533.

³ *Ibid.*, p. 534. Mr. Hammarskjöld has likewise acknowledged that Governments have transmitted information to him concerning staff members (*Report of the Secretary-General on Personnel Policy*, 2 November 1953, U.N. Doc. A/2533, p. 7, and General Assembly, Eighth Session, *Official Records*, Fifth Committee, U.N. Docs. A/C.5/SR. 413, p. 9, A/C.5/SR. 414, p. 14).

The French Government, it may be noted, has created a board which recommends French nationals for appointment to posts in the international secretariats. It has gone so far as to remonstrate with the Secretary-General after he appointed certain French nationals not among those so recommended, though it did not question his legal right to do so. The *Conseil d'État*, in an Order of 20 February 1953 concerning the case of a former official of the Institute of Intellectual Co-operation whose application for employment with Unesco had not been supported by the French Government, ruled that the equity of French Governmental evaluations are not subject to judicial inquiry (see Rolin, *Advisory Opinion on the Rights and Obligations of International Civil Servants*, prepared for the Federation of International Civil Servants Associations, 1953, p. 19). Security evaluations by the United States Government, since 1953, have been subject to challenge by the United States nationals concerned before the International Organizations Employees Loyalty Board (see *infra*, p. 87, n. 1). The French Government has expressed its view that, '[Every] Member State, not only every host State, has the indisputable right to establish the conditions under which it authorizes its nationals to become staff members of the United Nations. However, whatever measures of this kind a State may take are a matter between it and its nationals; as far as the United Nations is concerned, such measures are *res inter alios acta*; the Organization is not called upon to sanction them and they cannot limit the right of the Secretary-General to employ or to continue to employ in the Organization any person he considers qualified for such service, even if that person is not authorized by his Government to accept or continue employment.' (General Assembly, Seventh Session, *Official Records*, 418th Plenary Meeting, 30 March 1953, A/PV. 418, p. 607.) For comment on this French approach, which perhaps is more consistent rationally than practically, see Cohen, 'The United States and the United Nations Secretariat: A Preliminary Appraisal', in *McGill Law Journal*, 1 (1953), No. 3, pp. 189-90.

⁴ See Letter of the then Secretary of State, James F. Byrnes, to Congressman Karl Mundt in the United States Senate, Committee on the Judiciary, *Activities of United States Citizens Employed by the United Nations. Hearings before the Sub-Committee to Investigate the Administration of the Internal Security Act and Other Security Laws*, 1952 (hereinafter referred to as *Hearings*), p. 414.

modified their position, and, while not commenting upon the professional qualifications of applicants, commenced to take decisions on the question 'whether any information of a derogatory character is of sufficient substance to warrant the conclusion that the individual would appear to be so pre-disposed, through political affiliation or sentiment, as to be a poor risk in terms of adherence to his oath as an international civil servant. . .'.¹ In practice, the relevant Department supplied the Secretary-General, confidentially and orally, with conclusions on the subject. It did not submit the facts upon which those conclusions were based. The Department's evaluations subsequently were extended from applicants to members of the staff of United States nationality.² The Department from the beginning acknowledged that 'the decision of appointment or retention, as the case may be, rests as always with the Secretary-General'.³

The Secretary-General stated that he 'could not act on the basis of a mere adverse comment—usually expressed in a single word—without, in effect, accepting instructions from the United States Government'.⁴ The opinions of the Department served only to stimulate further investigation by the Secretary-General. The limitations of his resources in the matter of investigation were such that he was able in but few cases to reach conclusions which made action possible.⁵

In 1950 the Secretary-General terminated the appointment of several members of the staff, some apparently on 'security' grounds, against whom he felt he had 'convincing evidence'.⁶ It seems probable that this evidence was not of subversive acts, except in so far as affiliation of the United States nationals in question with the American Communist Party might, under a theory of conspiracy, be deemed such. In this connexion the Secretary-General later stated as follows:

' . . . in view of the present laws and regulations of the United States toward the American Communist Party and verdicts of the courts on the leadership of that party, no United States national who is a member of the American Communist Party and who is, thereby, barred from employment in the service of his own government, should, as a matter of policy, be employed in the Secretariat. A major consideration for such a policy is, of course, the fact that the United States is the host country to the permanent Headquarters.'⁷

Those officials who were discharged in 1950 on account of membership of the Communist Party held temporary or fixed term, as contrasted with

¹ Memorandum of the Department of State on Arrangements with the United Nations for Provision of Information on United States Nationals, *Hearings*, p. 415.

² For details of the arrangement see *Report of the Secretary-General on Personnel Policy*, 30 January 1953, U.N. Doc. A/2364, Annex I, p. 15, and *Hearings*, p. 415.

³ *Ibid.*, p. 416.

⁴ U.N. Doc. A/PV. 413, p. 536. See also U.N. Doc. A/2364, p. 16. It is interesting to note that 'in at least four cases' adverse comments were later 'completely withdrawn' (*ibid.*).

⁵ U.N. Doc. A/2364, p. 16; *Hearings*, p. 417.

⁶ U.N. Doc. A/2364, p. 16.

⁷ U.N. Doc. A/PV. 413, p. 536.

permanent, contracts. The Secretary-General argued before the Administrative Tribunal,¹ to which the discharged employees appealed, that he had the power to terminate temporary contracts 'without showing cause'.² The Tribunal, in a controversial set of judgments,³ rejected this contention. Accordingly, at the General Assembly Session in 1951, the Secretary-General sought and obtained an amendment to the Staff Regulations which permit him 'at any time' to terminate the appointment of temporary staff 'if, in his opinion, such action would be in the interest of the United Nations'.⁴

The Assembly's definition of the Secretary-General's discretionary authority did not cover members of the staff holding permanent or fixed-term contracts. The Staff Regulations provide that such staff, who enjoy a tenure status similar to that possessed by the civil servants of many national governments, may be discharged 'if the necessities of the service require abolition of the post or reduction of the staff, if the services of the individual concerned prove unsatisfactory, or if he is, for reasons of health, incapacitated for further service';⁵ and, as a 'disciplinary measure', the Secretary-General may 'summarily dismiss a member of the staff for serious misconduct'.⁶

In 1952 a Federal Grand Jury sitting in New York began to call United States nationals who were members of the Secretariat for questioning as to possible violations of laws of the United States, 'including those directed against subversive activities and espionage'.⁷ In the same year, a

¹ A body established by the General Assembly in 1949 with competence to hear and pass judgment upon applications alleging non-observance of contracts of employment or of the terms of appointment of members of the Secretariat of the United Nations. The International Labour Organization has its own Administrative Tribunal, the jurisdiction of which has been accepted by the World Health Organization, Unesco, and the International Telecommunications Union. (See the Statute of the Tribunal and comments upon its establishment in *United Nations Yearbook*, 1948/49, pp. 919-22; *Reports of the Secretary-General*, 16 October 1946 and 27 September 1949, U.N. Docs. A/91, A/986; Huet, 'The Administrative Tribunals of International Organizations', in *Journal de droit international*, 77 (1950); Langrod, 'Le Tribunal Administratif des Nations Unies', in *Revue de droit public et de la science politique*, 67 (1951); and Puget, 'Le Tribunal Administratif des Nations Unies, ses décisions récentes en matière de licenciements et leur inexécution', in *Jurisclasser périodique, La semaine juridique*, vol. 26, 10 April 1952, pp. 994 ff.).

² *Howrani and 4 Others v. The Secretary-General of the United Nations*, Judgment No. 4, 14 September 1951, p. 2. '[The] Secretary-General could not give such reasons in many instances without breach of confidence with the source' (U.N. Doc. A/2364, p. 17).

³ Sources as disparate as James P. Richards, United States Delegate to the General Assembly, and Senator Henri Rolin, appear to agree that the Tribunal's rulings did not conform to the intentions of the General Assembly with respect to the clauses of the Provisional Staff Regulations upon which the rulings purported to be based (see U.N. Doc. A/C.5/SR. 407, pp. 13-14, and Rolin, *Advisory Opinion*, etc. [cited *supra*, p. 83, no. 3], p. 57).

⁴ *Staff Regulations and Staff Rules of the United Nations*, U.N. Doc. ST/AFS/SGB/94, Regulation 9. 1 (c), p. 43.

⁵ *Ibid.*, Regulation 9. 1 (a), pp. 42-43. Additional grounds for discharge were added in December 1953 (see *infra*, pp. 94 ff.).

⁶ *Ibid.*, Regulation 10. 2, p. 48. For 'misconduct', as opposed to 'serious misconduct', the Secretary-General may dismiss a staff member, but not in a summary fashion. He may invoke this disciplinary measure only after the matter has been referred for advice to the Joint Disciplinary Committee, unless the staff member agrees with the Secretary-General to waive this procedure (*ibid.*, Rule 110. 3, p. 49).

⁷ The presentment of the Federal Grand Jury is reprinted in *Hearings*, pp. 407-11.

Sub-Committee on Internal Security of the United States Senate began to take testimony in order 'to determine whether United States citizens who, even though they are United Nations employees, have been engaged in subversive activities which are clearly beyond the scope of their employment'.¹ Neither body informed the Secretary-General in advance of their intention to call members of the Secretariat. Eighteen of those summoned by the Senate Sub-Committee declined to answer questions concerning past or present membership in the American Communist Party, and, in some cases, with regard to espionage or subversive activities, on the ground of possible self-incrimination. For the most part, only those were called to testify in open, public session who had invoked the privilege in closed session. 'Over a score' of staff members declined to answer questions of the Grand Jury concerning communist activities, 'including in some instances past and present espionage activity against the United States'.²

In December 1952 the Grand Jury advised the Court that 'startling evidence has disclosed infiltration into the United Nations of an overwhelmingly large group of disloyal United States citizens', and declared it to be 'self-evident' that this situation constituted 'a menace' to the Government of the United States.³ The Grand Jury did not return any indictment containing a charge of subversive activity or violation of the law by any member of the Secretariat, nor did it specify how many 'disloyal' citizens had 'infiltrated' the United Nations. The Senate Sub-Committee, for its part, issued an interim report which recommended, *inter alia*, that 'legislative safeguards be established to prevent future employment by international organizations, located in this country, of American nationals of questionable loyalty to the United States'.⁴ In accordance with this recommendation the Senate, in June 1953, adopted without a dissenting vote a Bill introduced by Senator McCarran which, were it to become law, would prohibit a citizen of the United States from accepting employment in the United Nations without 'security clearance' from the Attorney General, and would require citizens employed by the United Nations at the time of its enactment likewise to seek clearance. The penalty for violation of the proposed Act by a citizen of the United States is a fine of not more than \$10,000, imprisonment for not more than five years, or both.⁵

¹ *Activities of United States Citizens Employed by the United Nations, Report of the Sub-Committee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws*, 1953, p. 1. See also *Hearings*.

² Presentment of the Federal Grand Jury on Disloyalty of Certain United States Citizens at the United Nations, in *Hearings*, pp. 407-11.

³ *Ibid.* In June 1954, however, a successor Grand Jury found the situation greatly improved.

⁴ *Report of the Sub-Committee*, loc. cit., p. 18.

⁵ See 83rd Congress, 1st Session, *A Bill to prevent citizens of the United States of questionable loyalty to the United States Government from accepting any office or employment in or under the United Nations, and for other purposes*, Calendar No. 224, S. 3, and Report No. 223 thereon. And see *infra*, p. 102.

Earlier, in January 1953, the President issued an Executive Order prescribing procedures for making available to the Secretary-General information concerning United States citizens employed or being considered for employment in the Secretariat. The Order provides for the investigation of such persons, and the submission to the Secretary-General of any derogatory information, 'in as much detail as . . . security considerations will permit', for his use in exercising his responsibilities. The Order is applicable also to citizens who are employees of other public international organizations of which the United States is a member. The investigations prescribed by the Order involved the filling out of questionnaires by staff members of United States nationality, their finger-printing, and their interview by agents of the United States Government. The Secretary-General advised such staff members to co-operate with their Government in these procedures, and, in order to expedite the conclusion of the investigations, permitted the distribution of the questionnaires and the finger-printing and interviewing to take place on United Nations premises.¹

2. *Opinion of the Commission of Jurists*

With regard to members of the staff who refused to testify, the Secretary-General expressed himself as 'deeply disturbed' by their attitude in relation to an organization which had been 'declared subversive by the United States Attorney General, an organization whose leaders had been convicted of teaching and advocating the overthrow of the United States Government by force and violence'.² He invoked Article 9 (1) (c) of the Staff Regulations,³ and, in the course of 1952, discharged those who held temporary contracts. Those having permanent appointments were put on compulsory leave, and an opinion was sought from an international commission of three distinguished jurists as to what further action, if any, could properly be taken. The Commission submitted its Opinion on

¹ See Executive Order No. 10422, 18 F.R. 239, as reprinted in U.N. Doc. A/2364, pp. 35-36. The Order was amended in June 1953 by Executive Order No. 10459, 18 F.R. 3183, reproduced in U.N. Doc. A/2533, Appendix to Annex I, pp. 5-11. The Order as amended affords persons investigated the opportunity of challenging alleged derogatory information in writing and in a hearing before an International Organizations Employees Loyalty Board, in which they may be represented by counsel, present witnesses and other evidence in their behalf, and cross-examine witnesses offered in support of the derogatory information. The standard the Board uses in making its determinations is 'whether or not on all the evidence there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States'. The Board transmits its findings 'as advisory opinions, together with the reasons therefor in as much detail as . . . security considerations permit', to the Secretary of State for transmission to the Secretary-General. The Unesco Executive Board agreed, as a temporary measure, to circulate the questionnaire prescribed under the Executive Order to applicants for employment of United States nationality, while making it clear that Unesco assumes no responsibility for its contents (see Unesco Docs. 33 EX/32, 33 EX/SR. 4 and 5). The General Conference subsequently defeated a move to reverse this policy.

² U.N. Doc. A/PV. 413, p. 536.

³ See *supra*, p. 85.

29 November.¹ It viewed the problem before it in terms of the 'mutual tolerances' which it saw as necessary if the relationship between the Organization and its Secretariat, on the one hand, and their host country or countries, on the other, were to be satisfactory. Membership in the Secretariat, the Commission stated, 'in no way abrogates, limits or qualifies the loyalty a person owes to the State of which he is a citizen'.² The Secretary-General, in exercising his exclusively international responsibility in the selection of staff, 'should regard it as of the first importance to refrain from engaging or to remove from the staff any person whom he has reasonable grounds for believing to be engaged or to have been engaged, or to be likely to be engaged in any subversive activities against the host country'.³ If a member of the staff of United States nationality declines to answer questions relating to past or present espionage or other subversive activities or to past or present membership in the American Communist Party or another organization declared to be subversive, by invoking the privilege against self-incrimination, that fact gives the Secretary-General cause to dismiss him, in that, in the Commission's view, 'either his answers would have incriminated him or he had no right to claim the privilege'.⁴ Persons against whom the Secretary-General reaches the foregoing reasonable belief, or who pleaded the privilege in the foregoing circumstances, as well as those convicted of a crime involving subversion, may, if the particular circumstances warrant, be dismissed for serious misconduct under Article 10.⁵ Such persons may in any case be dismissed by the Secretary-General 'on his own responsibility' for fundamental breach of their obligations under Articles 1 (4) and 1 (8) of the Staff Regulations, while those holding temporary contracts would be liable to discharge under Article 9 (1) (c) as well.⁶ Article 1 (4) of the Regulations then provided:

'Members of the Secretariat shall conduct themselves at all times in a manner befitting their status as international civil servants. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the United

¹ The Opinion is printed in U.N. Doc. A/2364, Annex III, pp. 21-33. For critical comment on the Opinion see Cohen, *op. cit.*, pp. 180-91. See also Langrod, 'La Crise de la fonction publique internationale', in *Annales Universitatis Saraviensis*, No. 6, 1953, and Boitel, 'Situation et problèmes actuels de la fonction publique internationale', in *Politique Étrangère*, vol. 18, March-April 1953.

² U.N. Doc. A/2364, p. 25.

³ Where there has been a conviction of a staff member for a crime involving subversive activities by the courts of his own country or the courts of any country having jurisdiction over him by reason of his residence, the fact of the crime, the Commission held, is *ipso facto* established. 'It is *res judicata* and should be accepted as such by the Secretary-General. . . . [We] are of the opinion that the Secretary-General should regard the conviction as an absolute bar to the employment or the continuation of the employment of the officer concerned in the State in question', whether the crime was committed before or after his joining the Secretariat. 'In our opinion there should be no differentiation in this respect between a citizen of the United States and a citizen of some other State resident in the United States.' (Ibid., p. 26.)

⁴ Ibid., p. 27.

⁶ Ibid.

⁵ See *supra*, p. 85.

Nations. They shall avoid any action and in particular any kind of public pronouncement which may adversely reflect on their status. While they are not expected to give up their national sentiments or their political and religious convictions, they shall at all times bear in mind the reserve and tact incumbent upon them by reason of their international status.¹

The Secretary-General announced on 5 December that he had decided to 'use the conclusions and recommendations of this opinion as the basis of my personnel policy'. However, he later added that this did not mean that he 'accepted all the arguments in the opinion or all the implications that might be drawn from it'.² He requested staff members whom he had placed on compulsory leave after pleading the privilege to withdraw their plea. When they refused to do so, he terminated their employment on the ground that they were in breach of Regulation 1.³ Shortly afterwards the Secretary-General, prompted by concern among the delegations about the course of events, requested the General Assembly to place the item of personnel policy on the agenda of its Seventh Session.⁴

The report which the Secretary-General submitted to the General Assembly made it clear that the Secretary-General essentially accepted the

¹ *Staff Regulations*, loc. cit., p. 4. Regulation 1. 8 reads: 'The immunities and privileges attached to the United Nations by virtue of Article 105 of the Charter are conferred in the interests of the Organization. These privileges and immunities furnish no excuse to the staff members who enjoy them for non-performance of their private obligations or failure to observe laws and police regulations. In any case where these privileges and immunities arise, the staff member shall immediately report to the Secretary-General, with whom it alone rests to decide whether they shall be waived.' (Ibid., pp. 5-6.) The Commission further suggested that the Secretary-General should establish a panel, composed of senior members of the Secretariat under independent chairmanship, which would afford staff members with permanent or fixed-term contracts the opportunity for a full hearing in private, and which would submit advisory opinions to the Secretary-General on what action, if any, he should take. Mr. Lie acted upon this suggestion, but, subsequently, the panel so constituted appears to have been dissolved (see U.N. Doc. A/C.5/566, pp. 11-12).

² U.N. Doc. A/2364, p. 9. In March 1953, in introducing the debate of the General Assembly upon his personnel policy, the Secretary-General pointed out that he had 'by no means accepted everything' in the opinion of the jurists. 'Indeed, it was because of reservations about some aspects of the jurists' opinion that I did not place it before you for discussion and have instead submitted my own report.' (U.N. Doc. A/PV. 413, p. 537.)

The Director-General of the Food and Agriculture Organization of the United Nations announced that he regarded the opinion of the jurists as a 'valuable guide', which, he indicated, he would substantially apply to the F.A.O. (See F.A.O. Administrative Memorandum No. 472, 19 December 1952.) The other Specialized Agencies have not publicly defined their policies. However, in accordance with the General Assembly's resolution of 1 April 1953, the Secretary-General consulted with the administrative heads of the Specialized Agencies concerning the substance of his Report of 2 November 1953 (U.N. Doc. A/2533), which, it should be noted, represents a considerable modification of the approach recommended by the jurists and of the policies initially adopted by the Secretary-General. He indicated that the representatives of the Specialized Agencies were in 'general agreement' with him (ibid., p. 5). The Agreements between the United Nations and the Specialized Agencies, which provide for the development of common personnel standards, supply a continuing basis for such consultations.

³ 'Their refusal of my request constituted, in my opinion, a clear case for dismissal for misconduct under Article X of the Staff Regulations. Nevertheless, I chose a less severe method of termination, one that would entitle them to the normal indemnities and severance pay. . . .' (U.N. Doc. A/PV. 413, p. 537.)

⁴ See U.N. Docs. A/2327 and A/2330.

recommendations of the Commission of Jurists with respect to discharging staff members who pleaded the privilege in response to questions involving subversive activities or against whom he had reasonable belief that they had been, were, or were likely to be, engaged in subversive activities. He defined such activities as those directed toward the overthrow of a government by force, including conspiracy toward such overthrow and incitement of it. He would act, the Secretary-General pledged, only upon the basis of 'tangible and convincing evidence'. He quoted with approval the declaration of the Assistant Secretary-General for Administrative and Financial Services that '... no organization dedicated to law and order in world affairs can hope to survive if its own administrative actions are arbitrary and precipitate, based on mere suspicion and devoid of the due process to which all civilized peoples are dedicated'.¹ And, 'to place the problem in its proper setting', Mr. Lie stated as follows:

'It should be kept in mind that the Secretariat of the United Nations works in a glass house not only physically, but in every respect. It is not a profitable place for spies and saboteurs. Almost all meetings and documentation of the United Nations are open for all to see and hear. No military secrets are ever handled by the Secretariat. Furthermore, the policies and programmes of the United Nations in all fields ... are determined by the governments of Member States, not by the Secretariat. The work of the Secretariat in carrying out these policies and programmes is subject to the constant scrutiny of the governments.'²

The Assembly's discussion of the Secretary-General's Report³ concluded with the adoption of a resolution which neither approved nor disapproved the Secretary-General's personnel policy,⁴ while rejecting a proposed resolution which might have been interpreted as impliedly critical of it.⁵ There was a widespread disposition in the Assembly, before taking substantive action, to await the outcome of the appeals against their discharge which twenty former members of the staff had filed with the Administrative Tribunal.

¹ U.N. Doc. A/2364, p. 3. See also the statement on personnel policy with special reference to the Secretary-General's report of the Staff Council of the Secretariat, U.N. Doc. A/2367, and a letter to the Secretary-General from certain representatives and alternates on the Staff Council, U.N. Doc. A/2366.

² U.N. Doc. A/PV. 413, p. 537.

³ See United Nations, General Assembly, Seventh Session, *Official Records*, 416th-422nd Plenary Meetings, 28 and 30-31 March, 1 April 1953, A/PV. 416-22.

⁴ See the remarks of the Delegates of New Zealand (A/PV. 422, p. 667), the Lebanon (*ibid.*, p. 668), and France (A/PV. 418, p. 606). The resolution noted the Secretary-General's report, expressed confidence that the Secretary-General would conduct his personnel policy in accordance with Articles 100 and 101, and requested him to submit a further report to the Eighth Session (after consulting with the administrative heads of the Specialized Agencies), with his recommendations and with the comments of the Advisory Committee on Administrative and Budgetary Questions thereon. It was adopted by a vote of 41 to 13, with four abstentions.

⁵ The resolution, proposed by certain Arab and Asian Delegations, was rejected by a vote of 29 to 21, with eight abstentions.

3. *The decisions of the Administrative Tribunal*

The principal contentions of the applicants to the Tribunal were that the contested decisions were illegal in that: (a) they were the result of improper pressure exercised by agencies of a Member State upon the Secretary-General in violation of Article 100; (b) they were based upon arbitrary political considerations, particularly suspected communist affiliations, in disregard of their rights to independent political convictions; (c) the plea of privilege does not constitute a breach of the Staff Regulations, in that United States staff members, as a condition of employment, had not surrendered their constitutional rights, and in that the exercise of the privilege, under American law, does not create a presumption of guilt; (d) in the case of permanent staff, discharge may be effected only for the reasons set forth in Regulations 9. 1 and 10. 2,¹ which do not apply here; and (e) in the case of temporary staff, Regulation 9. 1 (c)² cannot be regarded as granting the Secretary-General absolute discretion, and, were it so regarded, the applicants would none the less be entitled to benefit from the legal position existing prior to the amendment of the Regulations.³

The respondent Secretary-General⁴ replied that: (a) he had confined himself to receiving information from the State Department, and at no time had surrendered his power of decision with respect to the retention or appointment of staff; (b) he discharged the applicants not because of their political opinions, but on account of their failure to conduct themselves in a manner befitting their status of international civil servants; (c) their claim of privilege gave rise to the presumption that they were or had been engaged in activities directed toward the violent overthrow of a Member State, and constituted a public pronouncement which reflected adversely upon the international civil service and rendered the applicants unworthy of trust and confidence; (d) this violation of duty constituted serious misconduct (Regulation 10. 2) and failure to render satisfactory service (Regulation 9. 1) and rendered void the subsisting contracts between the applicants and the United Nations; and (e) in the case of temporary staff, the Secretary-General is not required to state reasons for termination, and, no evidence of bad faith having been produced and no acquired rights having been disturbed, his action was proper.⁵

The Administrative Tribunal upheld the action of the Secretary-General

¹ See *supra*, p. 85.

² *Ibid.*

³ See *Crawford and Nineteen Others v. The Secretary-General of the United Nations, Brief on Behalf of Nineteen Appellants*, 1953.

⁴ It should be noted that on 10 April 1953 Mr. Dag Hammarskjöld succeeded Mr. Trygve Lie as Secretary-General. Mr. Lie had submitted his resignation six months earlier, for reasons unconnected with personnel problems.

⁵ See *Crawford and Nineteen Others v. The Secretary-General of the United Nations, Statement and Briefs for the Respondent*, 1953.

in nine cases involving temporary appointments.¹ It decided in favour of the applicants in one case involving a temporary appointment,² and in eleven cases involving permanent appointments.³ In the four cases in which the Tribunal ordered reinstatement, the Secretary-General exercised his right to call upon the Tribunal to decree compensation instead.⁴ In the cases where the applicants were successful the Tribunal awarded salaries up to the date of judgment, less termination indemnities, compensation in lieu of reinstatement, and costs.

With respect to the applicants' initial contention, the Tribunal ruled that it was 'not competent to pass judgment on the validity, in relation to the Charter, of an agreement between the Secretary-General and a Member State, whatever influence this agreement might actually have had on the decision taken . . .'.⁵ It emphasized that, since Article 1 (4) of the Staff Regulations recognizes the right of staff members not to give up political opinions, 'membership of any particular party would not, of itself, be a justification, in the absence of other cause, for dismissal. . . . A decision based on such premises is a violation of an inalienable right of staff members and represents a misuse of power.'⁶ As to the third and fourth of the principal contentions of the applicant bearing on the provisions of the Constitution of the United States, the Tribunal held that: 'Whatever view may be held as to the conduct of the Applicant, that conduct could not be described as serious misconduct, which alone under Staff Regulation 10. 2 . . . justifies the Secretary-General in dismissing a staff member summarily. . . .'⁷ Nor could the plea of privilege justify discharge on the ground of 'unsatisfactory services', since the word 'services' is used in the Staff Regulations and Rules solely to designate professional behaviour within the Organization. 'If it is admitted that the plea of constitutional privilege in respect of acts outside a staff member's professional duties constitutes a breach of Staff Regulation 1. 4,⁸ this fact cannot be considered as unsatisfactory services and cannot fall within the purview of Staff Regulation 9. 1.'⁹ The Tribunal thus found the Secretary-General's reliance upon Regulations 10. 2 and 9. 1 to be unfounded.

It likewise rejected his third submission, namely that, 'Under general principles of contract law if one party fails to carry out its obligations, the other party is justified in considering the contract at an end and in refusing

¹ Judgments Nos. 19-27, 21 August 1953.

² *Crawford v. The Secretary-General of the United Nations*, Judgment No. 18, 21 August 1953.

³ Judgments Nos. 28-37, 21 August 1953, Judgment No. 38, 26 August 1953 (*Glaser v. The Secretary-General of the United Nations*, the only case of an applicant being dismissed since Mr. Hammarskjöld's assumption of office).

⁴ See Judgments Nos. 39-42, 13 October 1953.

⁵ See, e.g., Judgment No. 19, p. 4.

⁷ Judgment No. 29, pp. 8-9, and some others.

⁹ Judgment No. 29 and some others; in particular Judgment No. 38 (*Glaser v. The Secretary-General of the United Nations*), pp. 5-8.

⁶ Judgment No. 18, p. 6.

⁸ See *supra*, p. 88.

to carry out its part.¹ The Staff Regulations, the Tribunal maintained, exhaustively list the grounds on which appointments may be terminated. The Opinion of the three jurists to the effect that the Secretary-General may terminate an appointment because of the contractual relationship between a staff member and the Secretary-General disregarded the nature of permanent contracts and the character of the regulations established by the General Assembly. Accordingly, the Tribunal found the decisions terminating the appointments of permanent staff to be illegal. However, in the case of those holding temporary appointments, the Tribunal recognized that the intention of the General Assembly was to invest the Secretary-General with discretionary powers. 'Such discretionary powers must be exercised without improper motive so that there shall be no misuse of power, since any such misuse of power would call for rescinding of the decision.'² While thus reserving to itself the right to inquire into the Secretary-General's motives, the Tribunal placed the burden of proof of establishing their impropriety upon the applicant. In ten cases, it found no evidence of improper motivation, and decided in favour of the Secretary-General; in the eleventh, it reached a contrary conclusion, and decided against him.³

¹ *Statement and Briefs for Respondent*, loc. cit., p. 28.

² Judgment No. 19, p. 6, and some others. See also Judgments No. 18, p. 4; No. 21, p. 7; and No. 24, p. 6.

³ The Tribunal's assertion of its competence to judge the motives of the Secretary-General in exercising his discretion under Regulation 9. 1 (c) to 'at any time terminate the appointment, if, in his opinion, such action would be in the interest of the United Nations', raises a difficult question. The Secretary-General had conceded, in discussing the scope of review in cases of termination where no reason is stated, that there 'remain appealable questions of good faith, etc. Of course, it is up to the Applicant to produce evidence of bad faith if it is available.' (*Statement and Briefs for Respondent*, loc. cit., p. 66.) On the other hand, the Regulation itself explicitly places the interpretation of the interest of the United Nations in the matter of termination in the hands of the Secretary-General alone; it is 'his opinion' which governs, and not that of the Administrative Tribunal. The Tribunal held, in effect, in Judgments Nos. 11 and 12, that the opinion of the Secretary-General, in pursuance of Article 9 of the Statute of the Administrative Tribunal, that reinstatement of a staff member would be impossible or inadvisable—the Tribunal accordingly being charged with fixing compensation in lieu of reinstatement—was not subject to review. More than this, the Secretary-General's recommendations for the adoption of Article 9. 1, and the Advisory Committee's comments thereon (U.N. Doc. A. 1912/Add. 1), together with the Secretary-General's explanation to the Fifth Committee that the interpretation to be placed upon the phrase 'in his opinion' in his proposed text, would be the same as that which the Tribunal had given to that phrase in the cited Judgments, reinforces the conclusion that his discretion thereunder was meant to be unreviewable. The relevant discussion of the Fifth Committee (General Assembly, Sixth Session, Fifth Committee, *Official Records*, 330th, 332nd, and 333rd Meetings) and its report to the Assembly (U.N. Doc. A/2108) support this view. Moreover, the phrase, 'in his opinion', as it occurs in Article 99 of the Charter with regard to the Secretary-General's right to bring any matter to the attention of the Security Council which, in his opinion, may threaten the maintenance of international peace and security, appears, both in its obvious purport and in the interpretation given to the Article in the *travaux préparatoires*, to invest the Secretary-General with unreviewable discretion in appreciating such matters. (See Schwebel in this *Year Book*, 28 (1951), pp. 375 and 377, n. 7. On the other hand, it may be argued that the independence of the Secretary-General in the exercise of his powers under Article 99 is not duplicated in the exercise of his powers under Article 101, which empowers him to appoint staff 'under regulations established by the General Assembly'.) It was further understood that the Secretary-General would be able to invoke Article 9. 1 (c) without providing the

The contention of the applicants that their 'acquired rights' were invaded by the application to them of a discretionary power with which the Secretary-General was invested after their appointment, was rejected by the Tribunal.¹

4. *Action taken upon the decisions of the Administrative Tribunal*

Following upon the award of the Tribunal, the Secretary-General requested the General Assembly to fill what he considered to be a gap in his powers, as found by the Administrative Tribunal. Considering himself bound by its rulings,² he proposed that the Assembly amend the law upon which those rulings had been based. The Assembly, of course, could not

staff member concerned or the Tribunal with a statement of specific reasons for his action, but, if the applicant is free to present evidence of the Secretary-General's allegedly improper motives, this would seemingly tend to compel the Secretary-General to elucidate his allegedly proper ones (though the Secretary-General may choose to rest on the advantage he enjoys in his opponent having to bear the burden of proof). It may be argued that to strip the temporary staff member of this right would be to leave him wholly without a substantive right of appeal. Yet the General Assembly's intention in adopting Regulation 9. 1 (c) would seem to admit this result, on the theory that safeguards afforded to permanent staff should not necessarily be extended to the temporary staff, because of the need for freedom of action in choosing a permanent Secretariat. The power of the Tribunal to review the Secretary-General's motives in cases involving permanent contracts is unquestioned. (See U.N. Doc. A/C.5/566, p. 13.)

¹ It may be noted that, in contending for 'acquired rights', the applicants argued that the relations between the United Nations and its staff are contractual in nature, a view which the Secretary-General urged, but which the Tribunal did not unqualifiedly accept, in contending that breach of Regulation 1. 4 by a staff member of itself justified the Secretary-General in considering the contract voidable. With respect to the legal position of the staff, the Tribunal declared:

'Relations between staff members and the United Nations involve various elements and are consequently not solely contractual in nature. Article 101 of the Charter gives the General Assembly the right to establish regulations for the appointment of the staff, and consequently the right to change them. . . .

'In determining the legal position of staff members a distinction should be made between contractual elements and statutory elements: all matters being contractual which affect the personal status of each staff member e.g. nature of his contract, salary, grade; all matters being statutory which affect in general the organization of the international civil service, and the need for its proper functioning e.g. general rules that have no personal reference.

'While the contractual elements cannot be changed without the agreement of the two parties, the statutory elements on the other hand may always be changed at any time through regulations established by the General Assembly, and these changes are binding on staff members.

'With regard to the case under consideration, the Tribunal decides that a statutory element is involved and that in fact the question of the termination of temporary appointments is one of a general rule subject to amendment by the General Assembly and against which acquired rights cannot be invoked.'

See Judgments No. 19; Nos. 21-25; No. 27, pp. 4-5; and No. 20, p. 4. See also Staff Regulations 12. 1 (U.N. Doc. ST/AFS/SGB/94, p. 53), and compare the Tribunal's views with those of the League Commission of Jurists of 1925 (*supra*, p. 74), of the League Committee of Jurists of 1932 (*Official Journal*, 1932, Special Supplement 107, p. 208), of the League Administrative Tribunal, and of the Assembly (*Official Journal*, 1946 citations *supra*, p. 74, n. 4. And see U.N. Doc. A/C.5/566, p. 12).

² 'As chief executive officer of the United Nations', Mr. Hammarskjöld declared, 'I consider myself bound by the findings and decisions of the Administrative Tribunal which the General Assembly itself established. Thus, I have to submit to the Assembly a request for such supplementary appropriations as are required for compensations decided upon by the Tribunal.' (U.N. Doc. A/C.5/544, p. 6. See also U.N. Doc. A/2534, Annex A, pp. 4-5.)

amend the Charter; it was a matter of revising the Staff Regulations 'in the light of the Charter'.¹ The Secretary-General proposed, in the first instance, that there should be added to the Staff Regulations an explicit statement that staff members shall not engage in any political activities outside the scope of their official duties, other than voting, unless otherwise authorized in accordance with Staff Rules issued by the Secretary-General. In the course of the debate in the Fifth Committee, it was made clear that such a regulation would not preclude 'passive membership' in a political party.² 'The Secretary-General . . . should have the right to exercise his judgment in these matters . . . free from arbitrariness and discrimination. . . . A staff member may consider his political activities appropriate to and consistent with his international status, and may, for that reason, be unwilling to accept the judgment of the Secretary-General to the contrary. . . . The sound operation of the Organization requires that such a staff member choose between continuing his political activities or remaining an employee of the United Nations.'³ This provision, the Secretary-General added, would have 'no retroactive implications. Previous activities are of significance only if they should reflect unfavourably on the staff member's present integrity or administrative suitability under the standards established by the Charter.'⁴ Moreover, 'in the implementation of the provision the staff member's rights to his religious or political convictions should be fully respected'.⁵ The Advisory Committee, the Staff Council, and the

¹ U.N. Doc. A/2533, p. 10. See also the comments of the Advisory Committee on the proposals set forth in this document (U.N. Doc. A/2555), as well as those of the Staff Council (Doc. A/C.5/561), and the observations of the Secretary-General on their commentaries (Doc. A/C.5/563), together with the following documents which appeared in the course of the Fifth Committee's debate on the Secretary-General's proposals: A/C.5/L. 255-62; A/C.5/564-74; A/2534, A/2580-1, A/2591-2; and the summary records of the proceedings of the Committee, A/C.5/SR. 406-22.

² The Secretary-General declared that he intended to implement the regulation prohibiting political activities by a staff rule which, with respect to party membership, would in substance run as follows: 'Membership of a legal political party is permitted, provided that such membership, in the case of the staff member concerned, does not entail subjection to party discipline or action in favour of the party, other than the payment of normal financial contributions.' The Fifth Committee suggested that the Secretary-General should consider the alternative text proposed by the United Kingdom: 'Membership of a political party is permitted, provided that such membership does not entail any positive action, current or potential, other than voting or payment of normal financial contributions, contrary to the provisions of staff regulation 1. 7. In any case of doubt, the staff member should consult the Secretary-General.' The Secretary-General explained that his reference to a legal political party did not imply that membership in a party which was illegal under the laws of the country of the staff member concerned would in all cases be considered a violation of the regulation, but that each such case would have to be considered individually. The representative of the United Kingdom explained that his proposal deliberately omitted the word 'legal', as membership of illegal parties would be debarred under Staff Regulation 1. 4. (General Assembly, Eighth Session, *Report of the Fifth Committee on Personnel Policy*, 7 December 1953, U.N. Doc. A/2615, pp. 6-7. See also U.N. Doc. A/C.5/566, pp. 1-3, as well as the other documentation cited *infra*, p. 96, n. 1.)

³ U.N. Doc. A/2533, p. 11. See also U.N. Docs. A/C.5/566, pp. 1-3, and A/C.5/SR. 414, p. 13.

⁴ U.N. Doc. A/2533, p. 25.

⁵ *Ibid.*

Delegations supported the essence of the Secretary-General's proposal, which was adopted by the Fifth Committee of the General Assembly without a dissenting vote.¹ There was even wider support for the Secretary-General's proposal to add a clarifying phrase to Staff Regulation 1. 4, which is of interest more because of the remarks with which it was annotated than for its substance.²

In addition, the Secretary-General proposed to broaden his powers by adding a clause to Regulation 9. 1 (a)³ which would permit him to discharge a permanent employee if the latter's conduct indicates that he does 'not meet the high standards of integrity required by Article 101, paragraph 3, of the Charter'.⁴ The phrases 'unsatisfactory services' and 'misconduct', as employed by the Staff Regulations and interpreted by the Administrative Tribunal, did not, the Secretary-General explained, adequately cover the requirements of integrity set forth in the Charter. An example of lack of integrity, the Secretary-General suggested, might be the case in which a member of the staff seeks to safeguard his purely personal interests despite his knowledge that by so doing he causes real and substantial harm to the Organization.⁵ He continued: 'On the other hand, the term integrity and

¹ There was a diversity of views as to the precise extent of the prohibition against political activities, which was not clearly reflected in the vote, however. The text adopted, which was proposed by the United Kingdom, was as follows: 'Staff members may exercise the right to vote but shall not engage in any political activity which is inconsistent with or might reflect upon the independence and impartiality required by their status as international civil servants.' (U.N. Doc. A/2615, p. 26. See also Docs. A/C.5/561, p. 3, A/C.5/564, pp. 2-3, A/C.5/566, pp. 1-3, A/C.5/SR. 408, p. 17, A/C.5/SR. 412, pp. 6-7, A/C.5/SR. 413, p. 8, A/C.5/SR. 414, p. 13, A/C.5/SR. 417, p. 15.)

² The Secretary-General proposed that Article 1. 4 (*supra*, p. 88) be amended to read: 'Members of the Secretariat . . . shall avoid any action and in particular any kind of public pronouncement which may adversely reflect on their status, *or on the integrity, independence and impartiality which are required by that status*. . . .'

'One problem in this connexion', the Secretary-General noted, 'is the use by a staff member of the privilege against self-incrimination in an official national inquiry concerning subversive activities and related matters. . . . Under certain conditions, it may be considered as incompatible with the status of an international civil servant. But a conclusion to the effect that the staff member should cease to serve in the Secretariat because of his invoking the privilege cannot be drawn without further investigation. . . . If this investigation gives an explanation of the action which removes its unfavourable implications, termination is not justified on the basis of the standards proper to the United Nations. . . .'

'And acts which are generally recognized as offences by national criminal laws normally will be violations also of the independent standard of integrity developed by, and proper to, the United Nations. However, the Organization must remain free to take no account of convictions of staff members for trivial offences or for offences which are generally held not to reflect on integrity, or of convictions made without observance of the generally recognized requirements of due process of law.' (U.N. Doc. A/2533, p. 24.)

³ *Supra*, p. 85.

⁴ U.N. Doc. A/2533, p. 20.

⁵ 'It is not very clear what is meant here, and the Council doubts whether integrity, in its accepted meaning, is likely to be involved in such conduct.' (*Statement by the Staff Council*, U.N. Doc. A/C.5/561, p. 7.) One might gather from his arguments before the Administrative Tribunal that the Secretary-General believed the case of a staff member who pleads the privilege in an inquiry regarding subversive activity, to be in point (*Statement and Briefs for Respondent*, loc. cit., p. 28). But see n. 2 above.

the term loyalty, as often applied in the political sphere, do not cover the same set of considerations, although, of course, in a case of contested "loyalty", acts might come to light which indicate a lack of integrity as an independent fact.¹ This proposal of the Secretary-General likewise gained wide support.²

The Secretary-General affirmed that his exercise of his new powers would be subject to review by the Administrative Tribunal to the full extent of its legal authority, an assurance which the Fifth Committee took pains to note. At the same time the Secretary-General submitted that the Tribunal might be expected to accept his views as to what constitutes 'lack of integrity' or 'political activity', to the extent that they obviously involve considerations of administrative policy not open to a review of a strictly legal nature.³ Yet he did not thereby appear to intend to suggest that the Tribunal's previous opinion as to what constitutes another ground for dismissal, namely, serious misconduct, exceeded its legal authority. On the one hand, the Secretary-General took the initiative in stating that he would be required to give reasons for action taken under his new powers; on the other hand, he declared that the widening of his responsibilities would be 'in a sphere which cannot appropriately, to its full extent, be subject to review by a tribunal confined to strictly legal criteria . . .'.⁴ He thus seemed to accept the form of the Tribunal's power of review, while restricting its substance. This proposal he combined with an affirmation of 'the right of the Tribunal to decide on its own competence'.⁵

¹ U.N. Doc. A/2533, p. 21.

² The additional provisions of Staff Regulation 9, 1 (a) which the Assembly adopted, with the exception of a last paragraph discussed below, are as follows:

'The Secretary-General may also, giving his reasons therefor, terminate the appointment of a staff member who holds a permanent appointment:

(i) If the conduct of the staff member indicates that the staff member does not meet the highest standards of integrity required by Article 101, paragraph 3, of the Charter;

(ii) If the facts anterior to the appointment of the staff member and relevant to his suitability come to light which, if they had been known at the time of his appointment should, under the standards established in the Charter, have precluded his appointment.

'No termination under sub-paragraphs (i) and (ii) shall take place until the matter has been considered and reported on by a special advisory board appointed for that purpose by the Secretary-General.'

After considerable discussion, the Fifth Committee approved the suggestion of the Secretary-General that the special advisory board shall be composed of a chairman, appointed by the Secretary-General on the nomination of the President of the International Court of Justice, and four members appointed by the Secretary-General in agreement with the Staff Council. (See U.N. Doc. A/2615, pp. 13-15.)

With respect to sub-paragraph (ii), see the decision of the Administrative Tribunal in *Wallach v. The Secretary-General of the United Nations*, Judgment No. 28, 21 August 1953, and the arguments of the Secretary-General in this case in *Statement and Briefs for the Respondent*, loc. cit., pp. 33-56.

³ See U.N. Doc. A/2533, pp. 14, 16.

⁴ *Ibid.*, p. 14.

⁵ U.N. Doc. A/C.5/563, p. 3. See also U.N. Docs. A/C.5/L. 259, A/C.5/574, and A/C.5/566, p. 13. In the last-cited document the Secretary-General clarified his approach with an illustration: '(I)n a case of lack of integrity it is for the Administrative Tribunal to decide whether the action referred to by the Secretary-General is capable of being labelled as "lack of integrity", while

To balance these extensions of his powers, the Secretary-General suggested, in addition to the establishment of an advisory panel which would consider instances of their proposed exercise, a measure of review by the General Assembly of the principles developed in his implementation of the Staff Regulations. He was willing to undertake that the standards on which he intended to base his decisions would be announced as fully as possible for the guidance of the staff. The Secretary-General further declared that he would establish procedures whereby staff members could place on record any statements, evidence, or information they considered relevant to charges made against them. Lastly, he gave assurances that the staff would be enabled to secure qualified legal counsel for their applications to the Administrative Tribunal more easily than in the past, through procedures which would be instituted under its aegis. These suggestions met with general support, and the General Assembly resolved to review the Staff Regulations and the principles and standards progressively developed and applied by the Secretary-General thereunder at its Tenth Session in 1955.

The Secretary-General's request for appropriations to pay the indemnities awarded by the Administrative Tribunal did not meet with equal success. After a prolonged debate the General Assembly decided to request an Advisory Opinion of the International Court of Justice on the following questions:

'(1) Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records, has the General Assembly the right on any grounds, to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent?

'(2) If the answer given by the Court to question (1) is in the affirmative, what are the principal grounds upon which the General Assembly could lawfully exercise such a right?'¹

III. *The principal legal issues*

1. *The allegiance of members of the Secretariat*

It is convenient to take as a starting point for the consideration of the principal legal issues involved a significant passage from the Report of the Commission of Jurists referred to above:²

'The United Nations is an entity separate and distinct from its Member States. It has its own policy-forming organs . . . its own judicial organization . . . and . . . the it is for the Secretary-General to say whether it *should* be labelled as "lack of integrity". The Tribunal sets the limits, so to speak, for the interpretation. The real implementation inside those limits, the setting of the standard, will primarily be the duty of the Secretary-General.'

¹ U.N. Doc. A/Res./194. See also U.N. Docs. A/C.5/SR. 420-4, A/2534, Annex A, pp. 4-5, A/2580, p. 6, and A/C.5/544, p. 6. And see *supra*, p. 74, n. 4, and the references there given to the League's *Official Journal*, 1946.

² See *supra*, p. 88.

Secretary-General is given a large measure of independence and certain powers of initiation. . . . It is equally clear that the United Nations is in no sense a super State. It has no sovereignty and can claim no allegiance from its own officers or employees. Membership of its staff in our opinion in no way abrogates, limits or qualifies the loyalty a person owes to the State of which he is a citizen. . . . We can find nothing in the constitution of the United Nations or the provisions governing the employment of its staff which gives the least ground for supposing that there is or should be any conflict whatever between the loyalty owed by every citizen by virtue of his allegiance to his own State and the responsibility of such a citizen to the United Nations in respect to work done by him as an officer or employee of the United Nations. . . . (In our opinion the immunities and privileges granted to members of the staff of the United Nations in no way qualify or limit the principle of the undivided loyalty to his own State of a member of the United Nations staff.)¹

On the face of it, the Commission's emphasis—if not its argument—is significant and calls for reflection. Membership of the staff of the United Nations qualifies the loyalty of a person to the State of which he is a citizen in so far as the policies of that State and of the Organization do not coincide. In this and all other cases, with respect to his official duties the member of the staff owes his entire responsibility to the Organization; this exclusively international responsibility, whether or not it is described as 'loyalty' or 'allegiance', takes precedence over national obligations. The authors of the constitution of the United Nations explicitly considered the possibility of a conflict between the two loyalties. They appear to have intended that, in such an eventuality, the international obligations of the staff member would prevail.² It may be maintained that there can be no essential conflict of loyalties in that international loyalty is no more than

¹ U.N. Doc. A/2364, pp. 24-25.

² *Supra*, pp. 76-77. The Staff Regulations have, from the outset, provided that the responsibilities of the staff 'are not national but exclusively international. By accepting appointment, they pledge themselves to discharge their functions and to regulate their conduct with the interests of the United Nations only in view.' (*Provisional Staff Regulations*, Regulation 1, U.N. Doc. A/64, p. 18; *Staff Regulations and Rules of the United Nations*, Regulation 1. 1, U.N. Doc. ST/AFS/SGB/94, p. 3.) The clause governing the regulation of the conduct of the staff member, which is elaborated in Regulation 1. 4 (*supra*, p. 88), does not indicate that, in his private life, the staff member must act 'with the interests of the United Nations only in view'. Yet it would seem to indicate that, in so far as his status as an international civil servant is affected by his private life, he must so act—an interpretation which tends further to subordinate his national obligations. Regulation 1. 9 restates the link between conduct and official functions, and employs the word 'loyalty' with respect to the latter:

'Members of the Secretariat shall subscribe to the following oath or declaration:

'I solemnly swear (undertake, affirm, promise) to exercise in all loyalty, discretion and conscience the functions entrusted to me as an international civil servant of the United Nations, to discharge these functions and regulate my conduct with the interests of the United Nations only in view, and not to seek or accept instructions in regard to the performance of my duties from any government or other authority external to the Organization.'" (Ibid., p. 6.) It should be added that Article 100, in providing that the staff shall not receive instructions from 'any government or from any other authority external to the Organization', makes clear that instructions from a government other than that of the staff member, or from a body such as an international political party, are equally inadmissible—considerations which seem particularly germane to the situation of the staff member, of whatever nationality, who is under Communist discipline. See *infra*, p. 115.

'the conviction that the highest interests of one's own country are served best by the promotion of security and welfare everywhere'.¹ It might further be suggested that loyalty to the State would be upheld by adherence of the staff member to its treaty obligations under Articles 100, 101, and 105, Article 2, paragraph 2,² and Article 103³ of the Charter, which, in so far as treaties among States bind the individuals who are the nationals thereof, would constitute law to which the staff member is subject. These possibilities need not be pursued here. For the authors of the Charter approached the problem in a more practical vein. They foresaw the possibility of a conflict between loyalties and apparently resolved such conflict in favour of the Organization. The interpretation of Article 100 by the International Court of Justice tends strikingly to reinforce the pre-eminence which the Organization enjoys.⁴ The Secretary-General appears to have excluded the above-quoted observations of the Commission of Jurists from those portions of their opinion which he accepted.⁵ The Delegations of Member States were explicitly or impliedly critical of them,⁶ with the possible exception of Argentina.⁷ On the level of formal recognition, it may be said that the exclusively international character of the official responsibilities of the members of the United Nations Secretariat has received increased emphasis in the course of the United Nations debate. However, while the importance of such formal recognition is not to be discounted, it is not sufficient to resolve the problems with which the Organization has been and continues to be confronted.⁸

¹ *Supra*, p. 76. See also Scott, 'The World's Civil Service', in *International Conciliation*, No. 496, January 1954, p. 287.

² 'All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.'

³ 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' Article 103 might be said to have an additional relevance, for if it 'is true of a state, it must also, *mutatis mutandis*, be true for individual Staff members who serve one of the principal organs of the United Nations' (*per* the Representative of the Netherlands in a speech to the Fifth Committee on 23 November 1953, summarized in U.N. Doc. A/C.5/SR. 408, pp. 17-18). If States are so obliged by Article 103, 'so should individual staff members be expected to place their obligations to the Secretariat above their national political life'. (*Ibid.*)

⁴ See *supra*, pp. 80-82.

⁵ See U.N. Doc. A/PV. 421, p. 660, together with U.N. Doc. A/2364.

⁶ See the statement of the Delegate of the United Kingdom, 'We also felt that the report was perhaps rather too emphatic about the allegiance of international civil servants to their own governments and made too little allowance for their allegiance to the international organizations in which they worked' (U.N. Doc. A/PV. 421, p. 651). See also the statements of the Delegates of New Zealand (A/PV. 416, p. 562), India (*ibid.*, p. 567), Belgium (*ibid.*, pp. 569-70), the Netherlands (A/PV. 417, p. 583), France (A/PV. 418, p. 606), Canada (*ibid.*, pp. 603-4), and Yugoslavia (A/PV. 421, p. 660).

⁷ See U.N. Docs. A/PV. 418, p. 612, and A/C.5/SR. 408, p. 8. See also the statement by the Delegate of Australia, U.N. Doc. A/PV. 417, pp. 592, 593.

⁸ The statement of the Delegate of France aptly summarizes the theory and adumbrates the pitfalls of practice:

'When an official enters the service of the Organization, he does not of course lose his

2. *Receipt by the Secretary-General of information from Governments concerning members of the staff and applicants*

It is believed that the submission by Governments to the Secretary-General of information regarding the qualifications of applicants for employment and of members of the staff is legally unobjectionable, provided that the Secretary-General remains free to evaluate and act or not act upon such data, and provided that he actually exercises that freedom. The Preparatory Commission foresaw that the Secretary-General might require information from Governments concerning candidates for employment,¹ and various delegations to the General Assembly maintained that view also with regard to members of the staff.² The Administrative Tribunal found that it was not competent to rule on the validity of the specific arrangements for the receipt of information which were agreed upon by the first Secretary-General and the United States Department of State.³ However, a substantial majority of the Governments which expressed themselves on the matter regarded the arrangements as admissible.⁴ Mr. Lie made it clear that he did not act solely on the basis of the terse evaluations of the Department, which did not include the evidence on which they were based,⁵ and the record would seem to bear him out.⁶ This is not to say that the arrangements approached the optimum in either their procedure or substance. While the communication by Governments of information to the Secretary-General is evidently not a matter for deliberate publicity, the question was asked whether the atmosphere of secrecy surrounding the procedures arrived at by the Department and the Secretary-General in 1949 was such as to induce confidence, and to afford the applicant or staff member in question the opportunity of contesting charges made against him.

While, as a matter of law, the procedures which the United States, the nationality; but he pledges loyalty, in all matters relating to his work, towards the international body alone. . . . If, in connexion with his work, a conflict arises between his obligations as an international civil servant and his duties as a citizen, his only choice is either to remain faithful to the Organization or to submit his resignation. . . .

'In the exercise of his duties, the international civil servant is, as it were, denationalized; outside his duties, he remains the citizen of a particular State, subject to the obligations which rest upon the citizens of that State. . . .' (U.N. Doc. A/PV. 418, p. 606.)

¹ *Supra*, p. 80.

² See the statements by the Delegates of the Philippines (U.N. Doc. A/PV. 420, pp. 636-7), Egypt (A/PV. 417, p. 581), the Netherlands (*ibid.*, p. 584), Ecuador (*ibid.*, p. 590), Australia (*ibid.*, p. 593), France (A/PV. 418, p. 607), the United Kingdom (A/PV. 421, p. 652), Iraq (*ibid.*, p. 655), and Yugoslavia (*ibid.*, p. 659). The Delegate of Guatemala dissented, however (A/C.5/SR. 414, p. 10).

³ *Supra*, p. 92.

⁴ See *supra*, n. 2. The Delegations of Syria (U.N. Doc. A/PV. 418, p. 611), the Byelorussian S.S.R. (*ibid.*, pp. 598-600), and Poland (A/PV. 420, p. 635) were not among the majority.

⁵ *Supra*, p. 84.

⁶ *Statement and Briefs for the Respondent*, loc. cit., p. 68. For a more critical interpretation of the 1949 arrangements see Rolin, *Advisory Opinion*, pp. 16-18.

French, and other Governments have introduced for transmitting information concerning their nationals to the Secretary-General would appear to respect the discretion in the selection of staff of which the Secretary-General—as ‘the chief administrative officer of the Organization’¹—is assured by Articles 100 and 101 of the Charter, the question arises whether, as a matter of practice, they actually do not tend to impair that discretion, at least in recruiting staff. For there may be a likelihood that the Secretary-General may not wish to appoint persons who had received their Government’s disapproval. Although the Secretary-General may in law consider, *inter alia*, the facts and recommendations submitted to him by Governments, the political inducement to give those facts and recommendations predominant, even if not conclusive, weight, is apparent. It may be said that, as long as the Secretary-General reserves to himself the actual decision, this is not only legal but desirable, because of the relevance which governmentally supplied data may have to the applicants’ qualifications, because the United Nations lacks the facilities to gather such data itself, and because the effect of appointing governmentally approved staff will be likely to promote the international confidence which the Secretariat must enjoy. There is force in these considerations—though the latter suggestion is perhaps open to challenge on the ground that the greater the confidence shown by a Government in its nationals appointed to the Secretariat, the more will the objectivity of such nationals be distrusted by other Member States. While this would not necessarily be the fact in all cases, it is a consideration which must be borne in mind.

It may be observed that if the McCarran Bill² had become law, the question would have arisen whether the United States as a result acted in breach of Articles 100 and 101 and Article 2, paragraph 2. The Committee on the Judiciary, in its Report to the United States Senate on the proposed Bill, stated as follows: ‘Enactment of s. 3 does not attempt to interfere with the discretion of employing officials of the United Nations. It does not tell them who they may employ or who they must employ. It only says to American nationals that they may not accept employment in or under the United Nations or any organ or agency thereof unless they have received security clearance.’³ This argument is perhaps not fully persuasive. Under the Act, if the Secretary-General exercises his discretion and appoints a United States citizen who has not received security clearance, and if such person accepts appointment, he thereupon ‘shall be fined not more than \$10,000 or imprisoned for not more than five years, or both’.⁴

¹ Article 97 of the Charter. See Carnegie Endowment for International Peace, *The United Nations Secretariat*, United Nations Studies, 4 (1950), pp. 63–69.

² See *supra*, p. 86.

³ United States Senate, *Report No. 223*, loc. cit., p. 6.

⁴ United States Senate Bill, s. 3, loc. cit., p. 5.

The consequent limitations upon his usefulness as a member of the United Nations staff must be far-reaching.¹

3. *Use of United Nations facilities and premises to facilitate the submission by Governments of information concerning staff members*

In order to expedite the processes of investigation under the Executive Order issued by the United States, the prompt conclusion of which the Secretary-General believed to be in the interests of the public credit of the Organization and the alleviation of the personnel crisis, the Secretary-General assisted in the distribution to staff members of United States nationality of the questionnaires prescribed under the Order. He also permitted the finger-printing required by the Order to take place within the Permanent Headquarters, and authorized staff members of United States nationality who might be interviewed by United States Government agents to invite the latter to their offices, if they so wished. The Secretary-General made it clear that, while advising such staff members to co-operate in these procedures, he did not order them to do so.² He further emphasized that the authorization to be interviewed at Headquarters was of a limited nature and did not constitute a general waiver of the inviolability of the premises assured by the Headquarters Agreement.³

The actions of the Secretary-General gave rise to varying degrees of criticism among a number of the Delegations,⁴ the staff associations,⁵ and others.⁶ The Secretary-General defended his attitude by reference to the interests of the Organization, which, in his view, lay in expediting the

¹ The Department of State opposed the enactment of the Bill for a variety of reasons, without considering whether it would put the United States in breach of its treaty obligations under the Charter. (See *Report No. 223*, loc. cit., pp. 7-9.)

The Bill prescribes the same penalties for United States citizens who are employed by the United Nations on the day of its enactment if they do not, within sixty days, file with the Attorney General of the United States registration statements in such form as the latter shall determine. 'Of course', the Report states, 'no country can absolutely require that an employee of the United Nations be dismissed. . . . With regard to persons already employed, s. 3 merely requires that each such person shall file a registration statement. . . . If the disclosure of such information should reveal that some of these employees are subversives, that would be a matter to be dealt with by negotiation between the State Department and the United Nations. . . .' (*Ibid.*, p. 6; see also Aghnides, loc. cit., p. 186.)

Compare the proposed Bill with the Italian Law of 1927; see *supra*, pp. 73-74.

² See Mr. Trygve Lie's address to the General Assembly, U.N. Doc. A/PV. 413, p. 538. See also the decision of the Administrative Tribunal in *Glaser v. The Secretary-General of the United Nations*, Judgment No. 38, 26 August 1953, pp. 2, 4-5.

³ U.N. Doc. A/PV. 413, pp. 538-9. See also Brandon, loc. cit., pp. 101-6.

⁴ The Netherlands (U.N. Doc. A/PV. 417, p. 586), the Byelorussian S.S.R. (A/PV. 418, p. 599), France (*ibid.*, p. 607), Indonesia (A/PV. 419, pp. 620-1), the United Kingdom (A/PV. 421, p. 652), and Iraq (*ibid.*, p. 655).

⁵ Federation of International Civil Servants' Associations, *Investigations into the Political Activities of International Civil Servants by National Agents* (FICSA/EX/4), and *Fingerprinting of U.N. & Specialized Agencies Personnel by National Agents* (FICSA/EX/7).

⁶ See, particularly, Rolin, *Advisory Opinion*, pp. 19-21, on the distribution of United States questionnaires.

completion of the investigations.¹ The Secretary-General acted within his rights under the Headquarters Agreement² and the General Convention on Privileges and Immunities.³ This is so although there is room for the view that the extension of facilities of the Secretariat and the Headquarters to further the enforcement of the internal laws of a State is not altogether consonant with the international character of the Organization, even if such enforcement is reasonably deemed to be in the interests of the Organization.

4. *The concept of the 'host country'*

The Commission of Jurists, influenced perhaps by the wording of the questions submitted to them by the Secretary-General,⁴ approached its task in terms of what it saw as the 'peculiar relationship which must exist between an international body such as the United Nations and the Member State within whose borders that international body works . . .'.⁵ It accordingly advanced the theory that the 'host country' (or countries) enjoys certain special rights *vis-à-vis* its own nationals in the Secretariat, and, to a lesser degree, with respect to staff members of other nationalities.

The distinction between the rights of host and other Member States does not follow from the Charter or the Staff Regulations. In a sense it may be said to derogate from 'the principle of the sovereign equality of all its Members' on which the Organization is based.⁶ The question also arises

¹ U.N. Doc. A/PV. 412, p. 661.

² 'The headquarters district shall be inviolable. Federal . . . officials of the United States . . . shall not enter the headquarters district to perform any official duties therein except with the consent of and under conditions agreed to by the Secretary-General. . . .' (Section 9 (a)). Section 7 (a) provides: 'The headquarters district shall be under the control and authority of the United Nations as provided in this agreement.' It would thus seem to follow that admission of national officials is a matter within the discretion of the Secretary-General, but that, in the exercise of his discretion, he is accountable to the Organization.

³ See Sections 20 and 21. The privileges and immunities of United States staff members under Article 105 and the United States International Organizations Immunities Act were not directly in point, however, in that they were not questioned about their official acts. When it was announced that Senate hearings would be held at which members of the Secretariat would be questioned, the Secretary-General on 13 October 1952 issued a memorandum to staff members of United States nationality recalling that ' . . . staff members of the United Nations called before the Senate Committee are not authorized to testify with regard to official activities of the United Nations and do not have the right to waive the immunity conferred by law. They are authorized to answer questions which are matters of public record regarding their position as staff members, such as title, job description, compensation, date of appointment and the like.' (U.N. Doc. A/2364, p. 14. See also *Report of the Sub-Committee*, loc. cit., pp. 2-3, and *United States v. Keeney*, 111 F. Supp. 233, noted in *International Law and Comparative Law Quarterly*, 2 (1953), pp. 482-3. With respect to the action of Unesco regarding Executive Order No. 10422 see *supra*, p. 87, n. 1.

⁴ See U.N. Doc. A/2364, p. 21.

⁵ Ibid. See also *supra*, pp. 87-88.

⁶ Articles 2, paragraph 1, of the Charter. Nor does the General Convention on Privileges and Immunities make any distinction between the treatment it requires an adhering State to accord to members of the Secretariat who are its nationals and to those who are not. The United States International Organizations Immunities Act does discriminate against American nationals, however (see *supra*, p. 78, n. 4).

[Note continued on opposite page.]

as to its conformity with the requirements of the independence and exclusively international character of the Secretariat in accordance with Articles 100 and 105. It may lead to some difficulties of an administrative nature. The conception of 'host country' in this connexion met with a varied reception on the part of the Member States.¹ The United States itself appeared to discard it by extending the application of Executive Order No. 10422 to United States citizens who are employees or applicants for employment in public international organizations of which the United States is a member other than the United Nations, many of which have their headquarters in countries other than the United States.² The Secretary-

The Headquarters Agreement, as interpreted by the United States, might be said to constitute support for the jurists, since, in the view of the United States, it is subject to a reservation respecting the right to safeguard the nation's security (see *supra*, p. 79, n. 1). The concept of special privilege inuring to the host country finds support in the headquarters agreements which host countries other than the United States have signed with certain of the Specialized Agencies. The Agreement between the International Civil Aviation Organization and the Government of Canada regarding the Headquarters of I.C.A.O. goes beyond incorporating provisions of differentiation in respect of Canadian nationals (see Section 24). It assures the Canadian Government of far-reaching security guarantees. See Sections 10 and 29, and, in particular, Section 40, which provides: 'Nothing in this Agreement shall be construed as in any way diminishing, abridging, or weakening the right of the Canadian authorities to safeguard the security of Canada, provided the Organization shall be immediately informed in the event that the Canadian Government shall find it necessary to take any action against any person enumerated in the Agreement.' The Agreement between the Swiss Federal Council and the World Health Organization concerning the Legal Status of W.H.O. likewise discriminates against Swiss nationals (see Article 18), and Article 25 in part provides: 'Nothing in the present agreement shall affect the right of the Swiss Federal Council to take the precautions necessary for the security of Switzerland. . . . The World Health Organization shall collaborate with the Swiss authorities to avoid any prejudice to the security of Switzerland resulting from its activity.' The Agreement between the World Health Organization and the Government of India concerning the Privileges, Immunities, and Facilities to be Granted by the Government of India to W.H.O. provides, in Section 30, that 'Nothing in the present agreement shall be construed to preclude the adoption of appropriate security precautions in the interests of the Government of India which shall be determined by agreement between the Government of India and the Director-General.' The Headquarters Agreement between the Food and Agriculture Organization and Italy has a limited security clause (Section 34 (c)). While, however, the Headquarters Agreement itself contains no such provisions, the Joint Resolution of the United States Congress authorizing the President to bring the Agreement into effect on the part of the United States in part provides, in Section 6 (listed in 61 Stat. 767 (1947) under Annex 2, inappositely entitled 'Maintenance of Utilities and Underground Construction') as follows: 'Nothing in the agreement shall be construed as in any way diminishing, abridging, or weakening the right of the United States to safeguard its own security and completely to control the entrance of aliens into any territory of the United States other than the headquarters district and its immediate vicinity. . . .' The Secretary-General has not accepted the contention of the United States that this in fact constitutes a legally valid reservation to the Agreement (see *supra*, p. 79, n. 1). See also 'Subversives in the United Nations: the World Organization as an Employer', in *Stanford Law Review*, vol. 5, No. 4, pp. 769-82.

¹ The Representatives of India (U.N. Doc. A/PV. 416, p. 566), Belgium (*ibid.*, p. 569), Syria (A/PV. 418, p. 611), Indonesia (A/PV. 419, p. 620), Liberia (A/PV. 421, p. 649), the United Kingdom (*ibid.*, p. 651), and Yugoslavia (*ibid.*, p. 660) criticized the concept, while the Delegations of Canada (A/PV. 418, pp. 602, 604), the Philippines (A/PV. 420, pp. 637-8), Iraq (A/PV. 421, pp. 4-5), and, to some extent, France (A/PV. 418, p. 607) spoke substantially in favour of it. See, in particular, the Filipino statement.

² See U.N. Doc. A/2364, p. 36, and United States Senate, *Report No. 223*, loc. cit., pp. 7-8. The State Department undertook to establish arrangements pursuant to the Order with forty-six international organizations other than the United Nations.

General stated that the jurists' recommendation for a special régime for host countries was one which he did not accept.¹

5. *Conviction and suspicion of members of the Secretariat on account of subversive activities*

A member of the Secretariat who engages in subversive activities against his own or any other Government violates the standards of conduct incumbent upon him and should be discharged. What weight is to be given by the Secretary-General in his finding that a member of the staff has so acted to the fact that the latter has been convicted by a national court of a crime involving subversion?² The Commission of Jurists advised that 'Where there has been such a conviction the fact of the crime is *ipso facto* established', that 'it is *res judicata*', and that it 'should be accepted as such by the Secretary-General'.³ The first Secretary-General, in affirming that there must be 'reasonable ground' for believing accusations of subversive activities—that charges 'must be supported by a preponderance of evidence'—stated that the Secretary-General 'should give proper weight' to national laws and legislative findings and to the findings of fact of national courts and tribunals, in addition to the evidence of the facts of each case.⁴ He thus seemed to modify the jurists' view that the decision of a national court *ipso facto* establishes the fact of the crime by allotting to that decision 'proper' rather than conclusive weight. His successor stated that 'the conclusions of national authorities concerning activities by staff members, are, of course, not binding on the United Nations, which must apply its own standards', but that 'national findings of fact, arrived at in accordance with generally recognized requirements of due process of law, are entitled to weight'.⁵

¹ See U.N. Doc. A/PV. 421, p. 661.

² A member of the staff of Soviet nationality, Valentin Gubitchev, was convicted of espionage in the United States, and allowed by American authorities to leave the country (see *United States v. Coplon et Al.*, loc. cit., and Spence, loc. cit.).

³ U.N. Doc. A/2364, p. 26. See *supra*, p. 88, n. 3.

⁴ See U.N. Doc. A/2364, p. 13. 'This standard', Mr. Lie later added, 'should, I believe, be applied . . . in complete independence of any national proceeding. The standard is a United Nations standard and would be applied by United Nations organs.' (U.N. Doc. A/PV. 421, p. 661.)

⁵ U.N. Doc. A/2533, p. 22. 'A conviction by a national court', the Secretary-General added, 'will usually be persuasive evidence of the commission of the act for which the defendant was prosecuted. . . . However, the Organization must remain free to take no account of convictions . . . made without observance of the generally recognized requirements of due process of law.' (Ibid., p. 24. See *supra*, p. 96, n. 2.) A number of delegations counselled caution against the automatic acceptance of national criteria in this respect. See the statement of the Delegates of New Zealand (A/PV. 416, p. 561), India (ibid., p. 567), Belgium (ibid., p. 571), Sweden (ibid., p. 573), Norway (ibid., p. 576), the Netherlands (A/PV. 417, p. 584), Indonesia (A/PV. 419, p. 620), and Yugoslavia (A/PV. 421, p. 660). See also Friedmann, 'The United Nations and National Loyalties', in *International Journal*, vol. 8, No. 1, pp. 22–25, and Friedmann and others, 'Loyalty Tests and the United Nations Secretariat', in *Canadian Bar Review*, December 1952, pp. 1080–3. For a point of view close to that of the Commission of Jurists see the statements of the Delegates of France (A/PV. 418, p. 607) and China (ibid., p. 615); and see Cohen, op. cit., on the French view.

The Secretary-General may perhaps be expected to seek to avoid occasions for implementing these theories which he rightly affirms. His concern for the confidence which the Secretariat must enjoy, for the public standing of the Organization as a whole, and for his political responsibilities under Articles 98 and 99 of the Charter,¹ will impel him, as a matter of policy, to defer to the laws and judgments of courts of Member States. He may hesitate to exercise his discretion against the views of a complainant Government, except in cases in which the member of the staff is patently the victim of unreasonable or arbitrary process. Whatever the defects of the concept of the 'host country', it is evident that the difficulties are much greater in cases where the staff member is resident in the State which finds him guilty of a crime involving subversive activities,² or, for that matter, of any other crime,³ whether it is the country of his nationality or not. As with the submission of information by Governments, the actual degree of independence enjoyed by the Secretariat may be limited unless the Member States join the Secretary-General in mutual support of their obligations under Article 100.

There may be instances of charges or conviction of members of the staff for subversive activities which the Secretary-General clearly would have to receive with especial caution. The Charter and the Staff Regulations may not normally be interpreted to justify the dismissal of a staff member who is found guilty by a successor Government of 'subversive activities' against it while that Government had not yet 'succeeded'; a succession or a change of government hardly entitles a State to request dismissal of its nationals who preferred or prefer the former Government. It would be for the Secretary-General to judge whether the political activities for which the staff member is charged or convicted were in breach of his obligations as an international civil servant. Counter-revolutionary activities might well be so judged, not because the revolution was successful, but because the staff member is required to abstain from political

¹ See Schwebel, *op. cit.*, pp. 19-30.

² A possibility of evidently limited application would be the transfer of such a staff member to a post in another country (for comment on this point see the Opinion of the Commission of Jurists, U.N. Doc. A/2364, p. 26).

If the member of the staff is convicted by the organs of the State in which he is resident, he may of course be subject to immediate imprisonment; indeed, he might be detained before trial. A host country has the power to enforce its jurisdiction and execute its judgments which other Member States lack, barring voluntary submission to that jurisdiction or extradition (which would not apply to political offences), or the assertion of jurisdiction over their nationals when on home leave. The jurisdiction of all Member States is limited by the immunity of staff members from legal process in respect of all acts performed by them in their official capacity (see *supra*, pp. 77-78, p. 77, n. 2, and p. 78, n. 4). It would appear to be limited further by Article 100, in so far as prosecution for unofficial acts must be in good faith and not designed to exert pressure upon the staff member *qua* staff member.

³ Conviction of a member of the staff by any Government for crimes other than those related to subversive activities might so reflect upon his integrity and the conduct incumbent upon him as to call for his dismissal (see *supra*, p. 96, n. 2).

action, whatever its direction. An accusation or conviction of a member of the staff for subversive activities carried on before his appointment would be weighed by the Secretary-General with particular circumspection. The staff member could not have been guilty of a breach of the Staff Regulations prior to his appointment; however, his subversive activities in the past, if proven, may ordinarily be reasonably judged to reflect on his present integrity.¹ If the Secretary-General confines his definition of past subversive activities normally reflecting on the present integrity of the staff member concerned to 'serious and generally recognized offences such as espionage or sabotage', as the Secretary-General suggested, there should be no difficulty.² It may be suggested that allegations by Governments of past subversive activities, viewed through the limits of that definition, would lead to few, if any, dismissals of staff members.

A particularly delicate question turns upon the alleged likelihood of a member of the staff engaging in subversive activities. The Commission of Jurists advised, and the first Secretary-General agreed, that the Secretary-General should not retain a staff member if he has 'reasonable ground for believing that that staff member . . . is likely to engage in subversive activities against the government of any Member State'.³ According to the first Secretary-General, for a finding that a staff member is likely to engage in such activities, 'something more than a remote possibility of his doing so must be shown. Of necessity, such a finding must be largely based upon the staff member's past conduct. However, convincing evidence that in the past an official had engaged in subversive activities would not necessarily lead to a finding that he was likely to be engaged in such activities either at present or in the future. Later conduct and attitudes might show there was no likelihood of his engaging in such activities again.'⁴

This appreciation of likelihood aroused considerable controversy, the Delegates of the United States⁵ and the United Kingdom⁶ speaking in favour of it, while some others vigorously opposed it.⁷ The second Secretary-

¹ That this will not necessarily be the case is shown by Rolin, *Advisory Opinion*, pp. 33, 54-55. See the comments of the Secretary-General, U.N. Doc. A/2533, pp. 12, 21, 22, (*supra*, p. 95), and of the Commission of Jurists, U.N. Doc. A/2364, p. 28.

² See *supra*, p. 95, n. 1. Elsewhere in the report there cited, however, the Secretary-General declared that subversive activities may be 'properly defined as was done in the last report of the Secretary-General on personnel policy, that is, "[as] activities directed towards the overthrow of a government by force, including conspiracy towards such overthrow and incitement and advocacy of it"''. (U.N. Doc. A/2533, p. 21.) This definition would appear to go beyond espionage and sabotage. Conspiracy, in particular, is a legal concept of considerable elasticity.

³ U.N. Doc. A/2364, p. 13. The Commission of Jurists restricted its reference to the Government of any host State.

⁴ U.N. Doc. A/2364, p. 13.

⁵ U.N. Doc. A/PV. 416, p. 559.

⁶ U.N. Doc. A/PV. 421, p. 652.

⁷ The Delegates of New Zealand (U.N. Doc. A/PV. 416, p. 561), the Netherlands (A/PV. 417, p. 585), France (A/PV. 418, p. 606), Indonesia (*ibid.*, p. 619), Mexico (A/PV. 419, p. 628), and Yugoslavia (A/PV. 421, p. 660).

General announced that he would discard it: 'The only sense in which the assumed likelihood may be of relevance should be covered by the standard of integrity required by Article 101 of the Charter and thus considered in the light of the rules concerning present suitability generally applied.'¹

The criterion of likelihood is, at first glance, open to the criticism that it involves the application of a sanction—dismissal—for an act which the Secretary-General suspects the staff member is performing or may in the future perform, but which actually the staff member may not now or ever commit. Article 100 enjoins members of the staff to refrain from any 'action' which may reflect upon their status as international officials. It may be difficult to bring mere suspicion within the orbit of that duty.

The admissibility of the criterion of likelihood seems to depend upon the interpretation of what is 'reasonable ground' for arriving at a belief that a likelihood exists. The standards advanced by the first Secretary-General would seem to have been satisfactory.² His successor's shift in emphasis, however, has the psychological advantage of dispensing with the notion of likelihood. In so far as the Secretary-General interprets narrowly the scope of past activities reflecting on present integrity, it may assure the staff of an increased degree of security. Moreover, the more explicit prohibition of political activities which has been introduced into the amended Staff Regulations may tend to reduce the incidence of actions giving rise to the suspicion that the staff member is likely to engage in subversive activity. Particularly under the amended Regulations, such actions might in themselves give cause for dismissal. It may be assumed, finally, that, in engaging an applicant, the likelihood of his engaging in subversive activities will inevitably be considered, even if, in matters of termination of appointment, the criterion as such is discarded.

The suspicions aroused by members of the staff invoking the privilege against self-incrimination in inquiries by United States organs concerning subversive activities against the Government of the United States have been among the main difficulties which have beset the Secretary-General's personnel policy.³ The Commission of Jurists, in a somewhat disputed interpretation of the privilege,⁴ concluded that a member of the Secretariat

¹ U.N. Doc. A/2533, p. 21.

² See *supra*, pp. 90, 108, and U.N. Doc. A/2364, p. 13. Professor Cohen has pointed out that there is a gap between the standard enunciated by the Secretary-General (a 'preponderance of evidence' in favour of the accusation) and that announced by the United States ('reasonable doubt as to the loyalty of the person'), and suggests that these differing criteria may give rise to friction between the United States and the Secretary-General (*op. cit.*, pp. 187, 194-5. See also *supra*, p. 87, n. 1). The Delegate of the United Kingdom found the standards which the Secretary-General set out to be 'perfectly satisfactory' (U.N. Doc. A/PV. 421, p. 652).

³ See *supra*, pp. 86-90.

⁴ 'If in reliance upon this privilege a person refuses to answer a question, he is only justified in doing so if he believes or is advised that in answering he would become a witness against himself. . . . It follows from this, in our opinion, that a person claiming this privilege cannot thereafter be

who, under the protection of the Fifth Amendment to the Federal Constitution of the United States, declined to answer questions as to whether he is or has been engaged in subversive activities, 'is just as unsuitable for continued employment by the United Nations in the United States as one who had actually been convicted'.¹ A plea of the privilege in response to questions relating to membership in the Communist Party of the United States or some other organization declared to be subversive led the Commission, more hesitantly, to the same conclusion.

The first Secretary-General, in substantially accepting these views, stated as follows:

'Especially in a time of serious political tension and concern over national security, the United Nations staff member has a positive obligation to refrain from conduct which will draw upon himself grave suspicion of being a danger to the security of a particular State. When he has refused to answer official interrogations relating to crimes involving subversive activities, he has by his own free choice violated that obligation; he has thereby contributed substantially to undermining the confidence which the international official is required to maintain.'²

Mr. Lie accordingly dismissed the staff members concerned. His successor took similar action in the single case which arose after he took office.³ On the other hand, the Administrative Tribunal, in the decisions examined above, declared:

'Whatever view may be held as to the conduct of the Applicant, that conduct could not be described as serious misconduct, which alone under Staff Regulation 10. 2 and the pertinent Rules justifies the Secretary-General in dismissing a staff member summarily without the safeguard afforded by the disciplinary procedure.'⁴

Subsequently, the Secretary-General announced that, while invocation of the privilege in an official inquiry concerning subversive activities might be considered 'as incompatible with the status of an international civil

heard to say that his answer if it had been given would not have been self-incriminatory. He is in the dilemma that either his answer would have been self-incriminatory or if not he has invoked his constitutional privilege without just cause. As, in our opinion, he cannot be heard to allege the latter, he must by claiming the privilege be held to have admitted the former. Moreover, the exercise of this privilege creates so strong a suspicion of guilt that the fact of its exercise must be withheld from a jury in a criminal trial. It is clear also that in addition to arousing a suspicion of guilt, the plea of privilege may well affect prospects of employment. . . .' (U.N. Doc. A/2364, pp. 26-27.)

¹ U.N. Doc. A/2364, p. 27.

² Ibid., p. 12. The Secretary-General added: 'I can conceive of circumstances when to plead the privilege would not necessarily be incompatible with the conduct required of international civil servants. But in these circumstances, for a United Nations staff member thus to draw upon himself grave suspicion of being a danger to the security of a Member State was, I felt, a grave breach of the staff regulations concerning the conduct required of staff members. Furthermore, the attitude taken by these witnesses tended to discredit and cause unjustified suspicion upon their fellow staff members and even to imperil the position of the whole Organization in the host country.' (A/PV. 413, p. 536.) With regard to the policy pursued towards a staff member who invoked the privilege in response to questions about Communist Party affiliations (rather than espionage), see *infra*, pp. 113-14.

³ See *supra*, p. 92, n. 3.

⁴ See *supra*, p. 92, for a fuller quotation from the Tribunal's rulings in this respect.

servant . . . the staff member should be given an opportunity to present his side of the case and to inform the Secretary-General of the reasons why he invoked the privilege'. He added: 'If this investigation gives an explanation of the action which removes its unfavourable implications, termination [of employment] is not justified on the basis of the standards proper to the United Nations.'¹

In dismissing the staff members who pleaded the privilege, the Secretaries-General relied largely on the ground that the plea constituted a public pronouncement which, whatever the inferences that might legally be drawn therefrom, in fact drew grave popular suspicion upon the members of the staff concerned and ill will upon the Organization as such. The Tribunal did not directly dispute this, nor could it reasonably have done so. On what may be persuasive technical grounds the Tribunal confined the sources of power of dismissal upon which the Secretaries-General might have drawn under the Staff Regulations in these circumstances, to the clause relating to disciplinary measures.² Among the disciplinary measures for which Regulation 10. 2 provides is dismissal for misconduct. This sanction is not, as a rule, to be invoked without prior consideration by the Joint Disciplinary Committee, which has merely advisory powers, except in cases of 'serious misconduct', where the Secretary-General may 'summarily dismiss' a staff member.³ It was upon this latter exception that Mr. Lie relied. Was the conduct of the staff members who pleaded the privilege so 'serious' as to merit summary dismissal? The Tribunal, stressing the complexity of the law surrounding the privilege and the apparent uncertainty of the Secretary-General himself as to the seriousness of the alleged misconduct, decided that it was not. While its emphasis upon what it saw as the procedural anomalies was plausible, it thereby substituted its judgment for that of the Secretary-General in a question which, it may be argued, is more properly the subject of political than legal appreciation. It did this despite the fact that there appears to be considerable support for the view that the Tribunal is not competent to override the Secretary-General's judgment in disciplinary matters—that the assessment of the gravity of an offence is the prerogative of the Secretary-General, except, perhaps, in so far as the Tribunal may

¹ U.N. Doc. A/2533, and see *supra*, p. 96, n. 2. It should be noted that the Secretary-General introduced a procedure of this kind in the *Glaser* case, before the Tribunal rendered its judgments. He appointed a committee to 'ascertain and report to the Secretary-General on the facts, circumstances and reasons' that had led Mrs. Glaser to invoke the privilege. Mrs. Glaser appeared before the committee, but apparently failed to dispel the unfavourable implications of her plea for, a week later, she was dismissed on the ground that she had violated her obligations under Staff Regulation 1. 4 and under her oath to the United Nations, thereby rendering 'unsatisfactory services' (see *Glaser v. The Secretary-General of the United Nations*, Administrative Tribunal, Judgment No. 38, pp. 2-3).

² *Supra*, pp. 92-93.

³ See *supra*, p. 85, n. 6.

consider whether his action was arbitrary or taken in bad faith.¹ The Tribunal did not consider the question whether the applicants could be found to have been properly dismissed on the ground of 'unsatisfactory conduct'.

The restatement of policy on the part of the Secretary-General has some advantages. It does not commit him to dismissing a staff member who pleads the privilege in an official inquiry relating to subversive activities, regardless of the equities of the case—an aspect of the question which was responsible for some criticism of the Report of the Commission of Jurists in this respect.² It affords the staff member an opportunity to remove the 'unfavourable implications' of his plea, at least in the eyes of the Secretary-General.

6. *Membership of the staff in political parties*

Passive membership in political parties is permitted to Secretariat officials under the Staff Regulations, subject to qualifications which have been noted above.³ There remains the question of membership in parties which are illegal or 'subversive' under the national laws of the countries of the staff members concerned. It is evident that the conduct incumbent upon a staff member will not normally be compatible with membership in an illegal political party.⁴ Yet an absolute rule to this effect might be subject

¹ Except for his ultimate responsibility to the General Assembly, the Secretary-General, before the establishment of the Administrative Tribunal in 1949, alone had the power to assess the gravity of the conduct of a member of the staff. During the debate of the Fifth Committee on the proposed Statute of the Tribunal, the Secretary-General, in supporting the creation of a Tribunal, declared: 'There are three areas of decision in which the Secretary-General's judgment should be final—namely, a decision as to whether a particular staff member's services are satisfactory or unsatisfactory, the decision of fact in disciplinary cases where non-observance of the terms of the staff member's appointment cannot reasonably be alleged, and decisions of fact in cases of serious misconduct. . . . His responsibility under the Charter as Chief Administrative Officer of the Organization can be satisfactorily discharged only if his judgment on the facts in the cases indicated above is considered final. This responsibility could not be effectively discharged if an independent administrative tribunal were given authority to reconsider the facts in such cases, in the absence of any reasonable allegation that the terms of an appointment had been violated, and to reverse the decision of the Secretary-General.' (General Assembly, Fourth Session, *Official Records*, Fifth Committee, Annex, vol. i, p. 146.) The Committee appears to have upheld the Secretary-General's point of view (*ibid.*, *Summary Record*, pp. 13-16, 21-25, 180, and the Annex thereto cited, pp. 153-4). It did not accept a suggestion by the Staff Committee that the jurisdiction of the Tribunal be extended to disciplinary cases. See also *supra*, p. 85, n. 1.

² See, in the following U.N. Documents, the statements of the Delegates of Belgium (A/PV. 415, p. 571), Sweden (*ibid.*, p. 573), Norway (*ibid.*, p. 577), the Netherlands (A/PV. 417, p. 588), Australia (*ibid.*, p. 594), Canada (A/PV. 418, p. 604), France (*ibid.*, p. 607), Indonesia (A/PV. 419, pp. 619-20), Mexico (*ibid.*, p. 628), the Philippines (A/PV. 420, p. 637), the United Kingdom (A/PV. 421, pp. 651-2), and Yugoslavia (*ibid.*, p. 660). The United States Delegate, in supporting the Secretary-General's view, stressed that he did not propose to act automatically upon the plea of privilege, but would consider other information as to the staff member concerned (A/PV. 416, p. 559); and the United Kingdom similarly emphasized this point.

³ See *supra*, p. 95, n. 2, and p. 96, n. 1.

⁴ See the documentation cited *supra*, p. 96, n. 1, and Rolin, *Advisory Opinion*, etc., pp. 32-33.

to the objection of being too automatic in its operation. The Secretary-General has accordingly made it clear that each case of membership in an illegal political party would be considered individually, and that such membership would not necessarily be held incompatible with employment in the United Nations.¹ This principle is scarcely capable of practical implementation if the staff member concerned is stationed in his own country. If he was a member of an illegal party before joining the Secretariat, but not during the course of his service with the United Nations, there might apply the considerations set forth above with regard to subversive activities carried on prior to employment with the United Nations.²

The attitude of the first Secretary-General on the subject was that, 'in view of the present laws and regulations of the United States toward the American Communist Party and verdicts of the courts on the leadership of that party', no United States national who is a member of the Party should, 'as a matter of policy', be employed in the Secretariat.³ The Administrative Tribunal apparently took a sharply differing view: 'Staff Regulation 1. 4 recognizes the right of staff members not to give up their political opinions. So that membership of any particular party would not, of itself, be a justification, in the absence of other cause, for dismissal. . . . A decision based on such premises is a violation of an inalienable right of staff members and represents a misuse of power.'⁴ It appears from the statements of the second Secretary-General that he will not apply a generalized ban on the employment of United States nationals who are members of the Communist Party, though such employees might be peculiarly liable to dismissal on other grounds.⁵

¹ See U.N. Doc. A/C.5/SR. 413, p. 8.

² *Supra*, pp. 107-8.

³ *Supra*, p. 84.

⁴ *Crawford v. The Secretary-General of the United Nations*, Judgment No. 18, p. 6. It should be noted that the Secretary-General explicitly denied that his decision to dismiss Miss Crawford was based on the fact of her past or present party membership (see *supra*, p. 93, n. 3).

⁵ The following statement of the Secretary-General merits quotation: 'Passive party-membership . . . in a democratic society is somewhat in the nature of a civic right which should be restricted only for the most imperative reasons. On the other hand, such party membership, in some cases, I think should obviously be considered as covered by a general prohibition of political activities. I have in mind, for example, the case where a party is declared illegal. I do not think there is any difficulty for any delegation on that point. I have also in mind another case where party membership cannot be permitted in the individual case because it would entail an obligation to action in favour of the party or subjection to party discipline which amounts very much to the same. The practical difficulties of implementation arise obviously when you have to decide whether in a specific case party membership, which is not in a party which is declared illegal, on the basis of this very approach should be considered as admissible or not. I feel that the Secretary-General should not be in a position where he has to investigate and decide upon the obligations following from party membership. I think the responsibility should rest with the staff member who should himself judge about his position, his obligations and his rights. . . . The rule would make it clear to the staff member that he is perfectly entitled to all kinds of passive party membership but that he breaks his obligations towards the organization if the membership imposes upon him personally the duty to take action in spite of the prohibition in the staff regulations. As I said, on this basis, the Secretary-General would not have to go into the matter unless and until the staff member engages in activities which call for an investigation. . . .' (U.N. Doc. A/C.5/566, pp. 1-3.)

The ruling of the Administrative Tribunal, if it is to be taken literally, would appear to involve a substantial *non sequitur*. Admittedly, the Staff Regulations recognize the right of staff members not to give up their political opinions. It hardly follows that membership of any particular party would not, of itself, be a justification for dismissal, for membership in a political party is not integrally related to the holding of political opinions, but to the expression of them. But the expression of political opinion is a right which in the case of Secretariat members was restricted at the time when the Tribunal made its ruling. It has been more restricted since.¹ The 'inalienable right' referred to by the Tribunal is not the right of members of the staff to belong to a political party, but the right to hold to their political and religious convictions. This was made clearer by the debate at the Eighth Session of the General Assembly.²

The policy enunciated by the first Secretary-General provoked varying reactions. It was defended as a realistic recognition of the fact that the American Communist Party, if it had not been declared illegal in terms, had none the less been officially declared subversive.³ It was criticized as constituting the incorporation into the law of the United Nations of a domestic standard of employment—a standard not consonant with the

¹ See Staff Regulations 1. 4 and 1. 7, U.N. Doc. ST/AFS/SGB/94, pp. 4, 5, and the same Regulations as amended (see *supra*, p. 95, n. 2, and p. 96, n. 1, and U.N. Doc. A/Res./191).

² See, in particular, the statement of the Delegate of Lebanon, U.N. Doc. A/C.5/SR. 412, pp. 6–8. The Delegate of the Netherlands, together with the Delegate of France, took the lead in pressing the contrary view: 'Surrender of the basic political right of free association would constitute an infringement of one of the fundamental human and democratic rights; such a right should not be sacrificed to the administrative needs of the Organization' (A/C.5/SR. 408, p. 17). That even he did not see the right as inalienable, however, may be gathered from the statement which this very Delegate of the Netherlands had made to the Assembly some eight months earlier: 'The question might even be raised whether it would not be advisable, in the interest of our Organization, to stipulate that members of the Secretariat, for the duration of their service, shall not be members of any political party. This, I believe, would not be contrary to Staff Regulation 1. 4. . . . Such a provision would avoid discrimination and might protect the Secretariat and its international character and forestall certain difficulties and criticisms, from any side whatever. A provision of this kind would follow from the same principle and from the same considerations as, for instance, regulation 1. 7, which stipulates: "Any member of the Secretariat who becomes a candidate for a public office of a political character shall resign from the Secretariat"' (A/PV. 417, pp. 584–5).

³ See, in particular, the legislative findings of the Internal Security Act of 1950 (59 Stat. 669–73, cited in U.N. Doc. A/2364, pp. 37–38), and the decision of the United States Supreme Court upholding the conviction of the leaders of the Communist Party under the Smith Act (*Dennis v. United States* (1951), 341 U.S. 497), and *supra*, p. 84. It should be noted, however, that membership in the United States Communist Party does not of itself constitute a violation of any criminal statute.

'Considering the climate of U.S. opinion and the decisions of the U.S. Supreme Court upholding the Smith Act—which virtually outlaws communist activity if not the Party itself—this proposition [not employing United States nationals who are Communist Party members] would seem to be one that the Secretary-General must accept.' There are difficulties of principle involved, Professor Cohen suggests, but 'whatever the theoretical variations, it would be very indiscreet today for the Secretary-General to retain in employment at home or abroad a member of the United States Communist Party who is a United States national'. (Op. cit., p. 183.) See also the statement of the Delegate of the United States, U.N. Doc. A/PV. 416, p. 558.

universal character of the Organization, which includes States with Communist Governments.¹

It is possible that an arguable case could be made out for excluding from the Secretariat Communists of any nationality.² For Article 101 places the highest standards of integrity as a paramount consideration superior to that of geographical distribution. The question arises whether the members of a totalitarian party, subject to party discipline, can be reasonably deemed to lack the requisite integrity for honouring the injunction of Article 100 'not to seek or receive instructions . . . from any other authority external to the Organization'. This seems to have been assumed by the Preparatory Commission and the General Assembly with respect to the members of two totalitarian parties other than the Communist (the Fascist and Nazi).³ The League experience seems to lend support to that view.⁴ The approach of the Secretary-General to the question of passive staff membership in political parties emphasizes freedom from party discipline. So does that of the Fifth Committee of the General Assembly.⁵ The standard thus jointly evolved at the Eighth Session of the General Assembly may, if it proves workable, be preferable to the rigid barring of employment of the members of any political party.⁶ It is a standard which seems consonant with the principles of the international civil service. Should that standard not prove to be practicable, the question will arise of the prohibition of even passive membership in any political party by members of the Secretariat.

Solutions of that nature, it may be stated by way of conclusion, are implicit in the unavoidable combination of two principles, namely, the international character of the Secretariat and the confidence which the Secretariat enjoys. That confidence is, in the last analysis, complementary to the international character of the Secretariat. It flows from the integrity with which the Secretariat upholds its exclusively international responsibilities. Perhaps, paradoxically, that confidence may to some extent depend upon the success with which the principle of the independence of the Secretariat is reasonably accommodated to national sensibilities—and legitimate national interests—in periods of international tension.

¹ See the statement of the Delegate of Norway (A/PV. 416, p. 577). Senator Rolin found additional reasons (*Advisory Opinion*, etc., pp. 53-54).

² See *supra*, p. 99, n. 2.

³ See *supra*, p. 77, n. 2.

⁴ *Supra*, pp. 73-74. On the other hand, similar charges of disloyalty to their oath to the League do not seem to have been made against the handful of Communists who were members of the League Secretariat. The policies of the Soviet Union towards the League during the brief period of its membership, however, were not such as to put the allegiance of Communist members of the Secretariat to the test.

⁵ See *supra*, p. 95, n. 2, and p. 96, n. 1.

⁶ It has been suggested that the chances of its workability have been enhanced by the terminations and resignations which took place before Mr. Hammarskjöld took office.

IMMUNITIES OTHER THAN JURISDICTIONAL OF THE PROPERTY OF DIPLOMATIC ENVOYS

By A. B. LYONS, M.A., LL.B.

OF the many immunities commonly enjoyed by diplomatic agents and their property, discussion of their immunity from the jurisdiction of the local courts, criminal and civil, has been most conspicuous in judicial decisions and in the literature. Their other immunities appear not to have attracted comparable attention. The reason for this may to some extent be that as the nature of these other immunities is often of a kind which is not susceptible of litigation, there are comparatively few reported cases on them. There seems, therefore, to be a need for an examination of the rules governing the principal immunities other than jurisdictional which are generally accorded to the property—movable, intangible, and immovable—used, held, or occupied by diplomatic agents. (Diplomatic asylum is not considered to be within the scope of this article.¹ The same applies to certain of the minor immunities relating to diplomatic premises, such as the *droit de chapelle*, exemption from billeting, the right to hoist the national flag and exhibit the national coat of arms, and the position of embassies, legations, and the like in time of war.)

Grotius's treatment of the subject is limited to the exemption from execution of the personal property of the envoy.² The work of Bynkershoek³ is concerned only with purely jurisdictional immunities. Vattel enumerates among the rights which are 'essential to the success of embassies' the inviolability of the envoy's goods, his house, and the *hôtel*.⁴ Phillimore⁵ mentions the following: the right of the envoy to hoist and display his country's flag and coat of arms;⁶ the *droit de chapelle*; and the inviolability of the residence of the envoy.⁷ Satow⁸ deals with, *inter alia*, the immunity of the residence of the envoy⁹ and of goods therein,¹⁰ and the *droit de*

¹ It is fully dealt with by Miss Morgenstern in *Law Quarterly Review*, 67 (1951), p. 362, and in this *Year Book*, 26 (1949), pp. 327-57. See also Oppenheim, *International Law*, vol. i (7th ed. by Lauterpacht, 1948), p. 712, n. 2; Vattel, *Le Droit des gens* (1758, reproduced in 1916), pp. 117, 118; Phillimore, *Commentaries upon International Law*, vol. ii (1855), p. 20 (where the existence of the right of asylum is denied); and Satow, *A Guide to Diplomatic Practice* (3rd ed. by Ritchie, 1932), p. 391 (where the right is said to be obsolete). And see Hurst, *International Law: Collected Papers* (1950), pp. 269-376; and Briggs, *The Law of Nations* (2nd ed., 1953), p. 793.

² *De Jure Belli ac Pacis*, L. ii, c. xviii.

³ *De Foro Legatorum* (1744; trans. by Laing, 1916), ch. v.

⁴ Op. cit., §§ 113-16.

⁵ Op. cit., p. 211.

⁶ At p. 24. See also *American Journal of International Law*, 26 (1932), pp. 177-80.

⁷ Op. cit.

⁸ § 385.

⁹ At p. 9.

¹⁰ § 372.

chapelle.¹ Authors of drafts of Codes² are no more exhaustive than textbook writers.³ Yet diplomatic privileges other than immunity from the jurisdiction of the courts are of considerable importance to the diplomat himself, seeing that, while it is only rarely that he becomes involved in judicial proceedings, he may daily wish to avail himself of such other privileges as are his due.

I. *Basis and scope*

That diplomatic envoys are entitled to a certain measure of immunity for some of their property, whether movable or immovable, seems to be undoubted. Neither the reason for nor the extent of such privileges is, however, free from doubt, and the writings of those authorities who deal with the matter are not always free from confusion on these topics. Confusion arises between the rules applicable to various categories of property, for instance, property which belongs to the ambassador personally, property which he holds for the purpose of his mission,⁴ property which

¹ Op. cit., § 405.

² E.g. Bluntschli, *Le Droit international codifié* (1878), pp. 191-223 (cited in *A. J.* 26 (1932), pp. 144-53); Pessoa, *Projeto de Código de Direito Internacional Publico* (1911) (cited *ibid.*, pp. 164-8); Fiore, *International Law Codified* (1890; trans. by Borchard, 1918) (cited *ibid.*, pp. 153-62). Cf. the Report of the League of Nations Committee of Experts for the Progressive Codification of International Law (Questionnaire No. 3 on Diplomatic Immunities), C. 196. M. 70, 1927, V, pp. 78 ff., which mentions the exemption of the property of diplomatic agents from taxation and includes in its plan or analysis of immunities the inviolability attaching to, *inter alia*, the premises and archives of the legation, the private residence of the persons concerned, their correspondence, and goods in their personal use. See also *A. J.* 20 (1926), Special Suppl., pp. 148-75. Cf. also two American 'codes': (1) The Washington Project for the Codification of American International Law (American Institute of International Law, 1925), which covers, so far as we are presently concerned, inviolability of person, of residence, of property, and of the legation buildings (see *A. J.* 20 (1926), Special Suppl.); and (2) The Draft Convention prepared for the Codification of International Law by the Harvard Law School in 1932, which covers similarly protection (i.e. immunity) of diplomatic premises, exemption from taxation thereon and on movable property, and protection of diplomatic archives.

³ Genet—*Traité de diplomatie et de droit diplomatique* (1931)—whose list of immunities is perhaps the most comprehensive, lays great emphasis on exemption from taxation (vol. ii, pp. 396 ff.); he shows that diplomatic premises are exempt from billeting (p. 435) and from local rates and taxes (p. 445); and discusses the *droit de chapelle* (p. 450), the right to display the envoy's flag (p. 463), the nationality of a person born on diplomatic premises (p. 538), the inviolability of such premises and their contents (p. 540), of the carriage of the envoy (p. 556), and of his archives (p. 549).

See also Oppenheim, op. cit., §§ 390-6 and 386. The Convention on Diplomatic Officers adopted at Havana on 20 February 1948 provides (Article 14) that 'Diplomatic officers shall be inviolate [inviolable] as to their persons, their residence, private or official, and their property', but without giving any indication as to what this 'inviolability' consists of—whether, for example, it covers freedom from taxation, and so on. See Hudson, *International Legislation*, vol. iv (1936), pp. 2385, 2390; and Briggs, op. cit., p. 769.

⁴ Wharton, *Digest of the International Law of the United States* (1886): 'A diplomatic agent holds real or personal property, apart from what he holds as Minister, subject to the local laws.' (1. 653.) But see Phillimore, op. cit., vol. ii, p. 171: '[The right of inviolability] applies to whatsoever is necessary for discharge of the ambassadorial function. The *private effects* [my italics] and above all the papers and correspondence of the ambassador are inviolable.' Cf. Hackworth, *Digest of International Law*, vol. iv (1942), p. 555, quoting the Foreign Service Regulations of the United States: 'If an officer holds in a foreign country real or personal property in a personal as

belongs to members of his family and of his suite. There is also occasional confusion between the rule of inviolability of the embassy premises (the *hôtel*), i.e. the right of the ambassador to refuse access and entry to them,¹ and the immunity of such premises from taxation and similar incidents. Nor is it clear on the authorities whether an envoy's property has an immunity of its own or whether the immunity is, so to speak, a reflection of that of the envoy himself.

The only right connected with property mentioned by Grotius is freedom from seizure: 'Neither can the moveable property of the ambassador, nor anything, which is reckoned a personal appendage, be seized for the discharge of a debt, either by process of law or even by royal authority. For, to give him full security, not only his person but everything belonging to him must be protected from all compulsion.'²

It is submitted that this question of compulsion—*coactio*—is the touchstone by which all assertions of claims to immunity must be tested. Admitted exemptions from the general law mean that there are within the jurisdiction of a State persons who are privileged not to obey that law. This being so, strong argument is required to justify any instance, and the only viable argument is that of necessity, based on the rule of Grotius which reads:

'Omnis coactio abesse a legato debet tam quae res ei necessarias quam quae personam tangit quo plena ei sit securitas.'

The operative word here is *coactio*, and the sole conception is that of compulsion, of forcibly preventing the envoy from carrying out his ambassadorial duties. It will be seen that since Grotius, the grounds alleged for claims and for grants of immunities have involved important additions to the idea expressed by him. The idea of *coactio* has widened to include mere inconvenience—or even annoyance. Grotius himself says that if the ambassador is protected against nothing more than violence and illegal constraint, the privileges would confer no extraordinary advantage,³ which may justify an increase in the number of privileges but does not necessarily justify any expansion of the fundamental principle—the avoidance of *coactio*. The justification for the grant of diplomatic immunity is the necessity for the maintenance of diplomatic intercourse, but the immunities

distinguished from an official capacity, such property is subject to the local laws.' With regard to the archives of an embassy Genet (op. cit., p. 549) states that their inviolability is 'self-evident', and gives instances of breaches of the observance of that rule. Cf. the Washington Project, § 21: 'The diplomatic archives are inviolable'; and Harvard Draft, § 5: 'A receiving State shall protect the archives of a mission from any violation and shall safeguard their confidential character', thus making the immunity a positive duty of the receiving State. See also Briggs, op. cit., p. 791.

¹ For example, Genet says that the *meubles* of a public minister are covered by the *franchise de l'hôtel* (op. cit., p. 15). Similarly, Satow (op. cit., p. 385) treats of goods as coming under the immunity of the residence of the envoy.

² L. 2. 18, § ix (Campbell's translation (1814), p. 242).

³ Op. cit., § iv. See Campbell's translation (1814), p. 229.

are justified only so far as they can be shown to assist the performance of functions essential to the accepted practice of diplomacy.

II. *Movable property*

Vattel¹ distinguishes between movable and immovable property. An ambassador's goods are exempt from the operation of the laws of the receiving State unless they are used in his business. (The trading propensities of early ambassadors are touched on by Adair² and explain this recurrent exception, which may seem to modern minds unnecessary.) The carriage of the ambassador has a sort of mystic quality of its own. According to Vattel³ it 'enjoys the same privilege as the hôtel': to insult the carriage is to attack the ambassador himself and the sovereign whom he represents.⁴ Today, an ambassador's motor-car and those of his staff are regarded as exempt not only from seizure but also from such police regulations as affect parking, *stationnement*, and the like.

The most important exemption enjoyed by the goods of an ambassador is freedom from seizure by way of distress for non-payment of rent, &c., or by way of execution of judicial process. The position in England is governed by the Diplomatic Privileges Act, 1708,⁵ which makes 'utterly null and void' all writs and processes whereby the goods or chattels of any ambassador or public minister may be distrained, seized, or attached.⁶ The statute goes on to provide for the punishment of attorneys who seek to enforce such process.⁷ (It will be seen that the remedy provided by the Act is of an incomplete and unsatisfactory nature.⁸ The offender may be tried and punished, but there is no provision enabling the aggrieved diplomat to recover his goods or their value from the distraining landlord or execution creditor, nor to follow the goods if they have been sold without recourse to litigation. This might constitute a submission to the jurisdiction of the court and probably permit the defendant to claim his rent or judgment debt by way of set-off or counterclaim.⁹)

According to Satow¹⁰ the goods of the envoy on the embassy premises are protected—this is presumably based on the immunity of the premises themselves—and the immunity covers 'all goods required for the fulfilment of the mission'. It also extends to all goods thereon, whether or not

¹ Op. cit., p. 113.

² *The Extraterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* (1929), pp. 98-99. Cf. Puente, *International Law as Applied to Foreign States* (1928), p. 116.

³ Op. cit., p. 119. Cf. Genet, op. cit., p. 556.

⁴ Cf. Oppenheim, op. cit., § 390 (Immunity of Domicile): 'And the stables and carriages of envoys are considered to be parts of [the envoy's] residences.'

⁵ 7 Anne, c. 12, often referred to as 'the Statute of Anne'.

⁶ S. 3.

⁸ An example, perhaps, of a *lex minus quam perfecta*—cf. Ulpian, *Frag.*, pr. 2.

⁹ Cf. Oppenheim, op. cit., § 391; Hurst, op. cit., p. 243.

¹⁰ Op. cit., §§ 385-8.

⁷ S. 4.

the owner has a claim to diplomatic immunity. He cites Wheaton's case¹ as authority for the immunity of all goods on premises occupied by the envoy, whether officially or not, e.g. his private house or flat.²

Hurst³ does not confine the privilege to goods on the envoy's premises; he extends it to 'all the property without which the task of the diplomatic agent cannot be fulfilled . . . archives and official correspondence in his chancery, furniture in his house, carriages or motor cars wherewith to get about and money at his bank wherewith to defray the expenses of his establishment'. And 'because no one but the diplomatic agent himself could determine whether a particular article was or was not necessary to the proper fulfilment of his duties, the privilege must in practice extend to all the property which the diplomatic agent possesses in the country in which he is stationed'.

The difference between Satow and Hurst on this point is noteworthy. Satow would grant immunity to the goods of an envoy only if they were on premises used for diplomatic purposes or occupied by a diplomat. Hurst would extend that immunity to all such goods wherever found and irrespective of whether they were 'required for the fulfilment of the mission'. The effect of the Diplomatic Privileges Act, 1708, is certainly wider than Satow would allow—it contains no restriction to goods on diplomatic premises, but it applies only to seizures of goods under 'writs and processes'. But there are other perils which may possibly beset goods owned by a diplomat and not in his actual possession—e.g. seizure by way of self-help under a claim of right; detention under a common law or statutory lien; or resale by an unpaid vendor under Section 39 of the Sale of Goods Act, 1893. In such cases it will be submitted⁴ that the true rule ought to be one lying somewhere between that of Satow and that of Hurst. Goods belonging to a diplomat and in his possession and control are privileged, whatever their nature. If he seeks to assert the immunity of goods not in his possession and control, he ought to be required to prove not only that they are

¹ Wheaton, the author of *Elements of International Law*, where he relates this incident at some length, was the United States Minister in Berlin. The landlord of the house in which he resided claimed the right under § 395 of the Civil Code of detaining certain of Wheaton's goods found on the premises at the expiration of the lease, to secure payment of compensation due for damage done to the house during its term. The Prussian Government decided that this was a case where the right of detention was created by contract, and so the general exemption, under the Law of Nations, of a Minister's property did not extend to these circumstances. The United States Government disagreed, and there was a long exchange of notes without much definite result. See Wheaton, *op. cit.* (8th ed. by Dana, 1886), p. 349, cited in Satow, *op. cit.*, § 386. See also on this incident Genet, *op. cit.*, § 15; he considers that the German Government was wrong, seeing that 'extritoriality neutralizes the sovereignty of the local law'. On the rights of a hotel-keeper *vis-à-vis* a minister's personal effects or household goods, see Puente, *op. cit.*, p. 116, citing *Opinions of the Attorneys General*, vol. v, pp. 69-70.

² He adds (§ 389) that after the termination of his mission the diplomatic agent preserves his immunity for the time necessary to complete and dispose of the affairs of his mission; but after his departure goods left behind by him become subject again to the local jurisdiction.

³ *Op. cit.*, p. 215.

⁴ *Infra*, pp. 123 and 149.

his, and that he is personally entitled to diplomatic immunity, but that to deprive him of them will result in hindering him in the carrying out of his official duties.¹

Judicial decisions

Cases on seizures or other interference with goods belonging to diplomatic envoys have been infrequent in England, largely perhaps because of the wide and stringent provisions in the Statute of Anne.² The Statute seems to have operated *in terrorem* in those instances where goods may be seized without legal process. In other cases, the creditor has first to overcome the obstacle presented by the immunity of the diplomat from civil jurisdiction before he can bring his debtor before the court. If the diplomat has waived his immunity and submitted to judgment, the Sheriff will, presumably before attempting to levy, be at pains to ascertain whether the waiver extends to execution—which, it is thought, it will rarely do.

The frequently-cited case of *Novello v. Toogood*³ is weakened as an authority by the fact that the plaintiff was not an envoy but the servant of an envoy. It is possible, however, to deduce from it some of the principles which would probably guide an English court in a case where the goods of an envoy had been seized. In particular, it is seen that the court would endeavour to treat the immunity restrictively and to apply the test of the necessity of the goods to the convenience of the envoy. *Novello v. Toogood* was an action of trespass for breaking and entering the house of the plaintiff, who was (*inter alia*) a chorister in the employ of the Portuguese Ambassador. He was also a lodging-house keeper. The defendant was the collector of poor rates, for which he had effected a distraint on the plaintiff's house. The plaintiff relied on the Statute;⁴ the defendant argued that the law did not protect the goods of servants of a public minister. In the course of his judgment Abbott C.J. said:⁵ 'Whatever is necessary to the convenience of an ambassador, as connected with his rank, his duties or his religion, ought to be granted.' But where the servant did not reside in the ambassador's house and let part of the house in lodgings, the house was not for the personal convenience of the plaintiff, and so could not be necessary for that of his master. Bayley J.⁶ explained that the goods were not such as were

¹ Oppenheim (op. cit.) treats of the immunity of an envoy's goods in summary fashion. In his Chapter VIII, 'Inviolability of Diplomatic Envoys', in the section (§ 386) headed 'Protection due to Diplomatic Envoys', he writes: 'The protection of diplomatic envoys is not restricted to their own persons, but must be extended to . . . their furniture, carriages, papers. . . .' And, in Chapter IX, 'Exterritoriality of Diplomatic Envoys', under the rubric 'Exemption from Criminal and Civil Jurisdiction' (§ 391), he states that envoys cannot be arrested for debts, 'nor can their furniture, their carriages, their horses, and the like, be seized for debts'.

² *Supra*, p. 119.

⁴ *Supra*, p. 119.

⁶ At p. 563.

³ (1823), 1 B. & C. 554.

⁵ At p. 526.

necessary in a residence of that description which the plaintiff's service to the ambassador required.

'The plaintiff's counsel claims an unrestrained exemption of all goods, without entering into the question of their being necessary or not. The consequence of such a doctrine would be to enable the servant to abuse that privilege which was intended for the ambassador's convenience, and not his own. Notwithstanding our decision in favour of the defendant, the plaintiff will still be able to execute all the necessary functions of his office.'

And Holroyd J. said:¹

'If the debt for which the seizure was made had arisen out of the plaintiff's situation as servant to an ambassador, the result of this case might have been different. But that was not so, nor can the ambassador be at all prejudiced by that which has been done.'

In the case of *Macartney v. Garbutt*,² some seventy years later, which arose out of a distress levied for local rates,³ Mathew J. said of the plaintiff, who was secretary to the Chinese Legation: 'He would seem to be clearly entitled to the privileges of the "corps diplomatique" and it would follow that his personal effects would be exempt from seizure.'

In neither of the two cases just cited was any real attempt made to examine the *ratio* of the privilege claimed. In the comparatively recent case of *The Amazone*,⁴ the nature of the immunity was to some extent examined, although not as fully as might have been done had not the plaintiff conceded that the defendant was entitled to claim immunity for his property generally, but not for the property in dispute. The action was for possession of the defendant's yacht. The Foreign Office certified that the defendant was an attaché at the Belgian Embassy and that his name had been included in the list of diplomatic persons prepared under the Diplomatic Privileges Act, 1708. The plaintiff contended that the defendant was entitled to such immunities only as were granted under that Act and, in view of Section 3,⁵ could claim immunity in respect of his property only, but not in respect of goods the property of which was in dispute. He argued, moreover, that there was a difference in quality and extent between the immunity of an ambassador, or a member of his suite, and that of a sovereign State. The latter 'rests on national considerations', while the immunity of an ambassador derives entirely from the Statute of Anne, and is limited by the wording of the Statute. In his judgment in the Court of first instance Langton J. at first declined to go into 'the full implications of any possible difference between the immunity enjoyed by a sovereign State and the immunity enjoyed by the representatives of that sovereign State'.⁶ He then quoted from the well-known dictum of Lord Atkin in *The Cristina*,⁷ that the courts

¹ At p. 564.

³ See *infra*, p. 144.

⁵ See *supra*, p. 119.

⁷ [1938] A.C. 485, at p. 490.

² (1890), 24 Q.B.D. 368.

⁴ [1939] P. 322; (on appeal) [1940] P. 40.

⁶ [1939] P., at p. 327.

of a country will not by their process, whether a foreign sovereign is a party to the proceedings or not, seize or detain property which is his, &c. Langton J. also quoted from the same case the passage in which Lord Maugham endeavours¹—not very convincingly, it may be thought—to distinguish between the immunity of a foreign sovereign State and that of an ambassador, and concluded that the property being in the defendant's possession, and he enjoying immunity, the Court was without jurisdiction. On appeal it was held that the immunity of foreign diplomats had not been restricted by the Act of 1708 to actions affecting their uncontested property; it extended to all actions, including those in which the title to the goods was in dispute. Slessor L.J. asked: 'What is the privilege, quite apart from the Statute of Anne, and how far does it extend? I think that all the text books and authorities agree and I do not think it is necessary to give any very copious citations.' So far as textbooks are concerned, his Lordship contented himself with quoting Dicey's *Conflict of Laws*² to the effect that the property of an ambassador could not be seized. He concluded by declining to express an opinion whether the defendant was or was not protected under the Statute of Anne: 'it is sufficient for my purpose to say that he can derive his protection from the Common law'.³

The position, then, regarding the movable property of diplomatic agents seems to be as follows: Their carriages are by long-accepted custom absolutely privileged. Other goods belonging to them are immune from seizure, that is, from distraint for rent or any form of execution for debt. The Statute of Anne which so provides in English law is merely declaratory of international law in general. The immunity extends to all property in the possession and control of the agent, certainly so far as it is necessary for the proper fulfilment of his duties. It is, however, at least arguable that the immunity does not extend to all property out of his possession. It would be difficult to contend, for example, that a pawnbroker may not retain goods pledged with him by a diplomat—or, put another way, that the diplomat has the right to demand the return of goods given in pawn without paying the debt for which they are a pledge. Similarly, diplomatic immunity will not operate to defeat the common law lien which a carrier has in respect of his charges for goods carried by him, or the lien of a garage proprietor for a motor-car repaired by him. *Aliter*, however, with the lien of the innkeeper on the goods of a guest, at least so long as the

¹ [1938] A.C., at p. 516.

² 5th ed. (1932), p. 196. See now 6th ed. (1950), p. 132. Slessor L.J. thought that there was nothing in any of the authorities to throw doubt upon that proposition 'except an early statement of Sir Edward Coke in his Institutes, which qualifies the immunity of the ambassador in a way which ever since has been disagreed with'. More particularity on the part of the learned Lord Justice might have been of assistance in finding the passage which he had in mind, although Coke has very little indeed to say on the subject of immunity of ambassadors.

³ [1940] P. 40, at p. 46. MacKinnon and Goddard LL.J. delivered concurring judgments.

goods are in the possession of the diplomatic agent. It is thought, on the other hand, that if the agent leaves goods, whether for safe custody or otherwise, in an hotel at which he has been staying, and later returns to claim them, the hotel-keeper may exercise his lien on them in respect of moneys owing to him.¹ This is not distraining, seizing, or attaching the goods, and thus does not infringe the Statute of Anne; and as the agent is no longer staying at the hotel, the goods are not on premises occupied by him. It is also submitted that the immunity accorded to the property of a diplomatic agent does not deprive a tradesman of his right under the Disposal of Uncollected Goods Act, 1952,² to sell in certain circumstances an article belonging to an agent left with him for repair.

III. *Intangible property*

Besides movable goods—furniture, clothing, baggage, and the like—a diplomat may well possess in the State to which he is accredited what are called in English law *choses in action*, namely, things such as stocks and shares, banking accounts, &c. Authority on their immunity is lacking, but it is conceived that control of or interference with these may considerably inconvenience or even interrupt the envoy in the fulfilment of his mission. For that reason he would appear, on first principles, to be entitled to claim exemption from the operation of such control. The universality of financial restrictions in one form or another lends interest and importance to the point.³ While some regulations, like the prohibition of capital issues and the restriction of dividends, are unlikely to affect the official life of a diplomat, control of his banking account, or the inconvertibility of the currency which he daily handles, may inconvenience him greatly. This was

¹ Under, e.g., the Innkeepers' Act, 1878.

² Which makes provision for the sale of goods accepted in the course of a business (e.g. of a watchmaker or shoe-repairer) for repair or other treatment but not redelivered, i.e. collected by the owner. The repairer has the right, after complying with certain formalities, to sell the goods on default of payment or collection.

³ In an article headed 'Aggrieved Diplomats' in the *Sunday Times* newspaper for 19 July 1950 it was stated that in March 1950 foreign diplomats in London were notified 'in letters from their bank managers that the Treasury had decreed that their personal accounts must be regarded as 'non-resident' accounts and subject to the consequent exchange restrictions'. The result of this, according to the article, was that while an ambassador could give a cheque drawn on an English bank to a resident in the 'sterling area', he could not accept a cheque from such a resident—'that would be dealing in sterling'. The subject of exchange control is highly technical and complex: see, however, the Exchange Control Act, 1947, Section 41 (2), which provides that the Treasury may give directions declaring that for all or any of the purposes of the Act a person is to be treated as resident or not resident in such territories as may be specified in the directions; the Direction dated 20 September 1947 made by the Treasury (S.R. & O., 1947, No. 2054); and the Instructions (E.C. (General), 29) issued by the Bank of England, operating, as directions from the Treasury, from 20 March 1950, on the subject of the determination of residence generally, which state that 'Diplomatic and consular accounts are generally treated as resident in the country represented.' See [Howard, *Exchange and Borrowing Control*, Supplement (1950), p. A 19.

recognized in a Uruguayan case, *In re Ledoux*,¹ decided in 1941, where, however, the Court may have gone a good deal further than is juridically defensible. Two members of the staff of the French Legation in Uruguay had accounts at a bank there. A judicial moratorium suspended all transactions by the bank. The two officials applied to the Supreme Court of Uruguay to have their deposits at the bank released. The Court granted the application. It said:

'Every act designed to prevent free disposition of bank deposits belonging to accredited diplomatic agents is contrary to the principles upon which are based privileges universally recognized for such agents and expressed in the principle of inviolability. . . . [The principal effect of the moratorium was to immobilize credits at the Bank. If this effect was] extended to deposits belonging to diplomatic agents . . . it would violate the principle of extritoriality sanctioned by universal doctrine, accepted by our country by means of the ratification of the Habana Convention, and would disregard the standards of reciprocity in international matters.'²

It is difficult to see what the principle of extritoriality has to do with bank deposits or how it can be applied to what is no more than an entry in a banker's book. Be that as it may, it is one thing to grant to a foreign official an immunity from the general law and quite another to put him in a privileged position as respects other creditors of a common debtor. If a bank suspends payment it is for the benefit of all its depositors; to compel the bank to pay out to one of them, even if he happens to be a diplomat, is a serious matter which requires strong justification. If a diplomat applies to the court in the way that was done in *In re Ledoux*, he should be put to the proof that non-payment of the money standing to his credit in the bank would seriously inconvenience him in the carrying out of his duties. Failing this, it would seem that a diplomatic agent is not entitled to any special treatment with regard to money which he has entrusted to a banker.³

IV. *Immovable property*

There seems to be general agreement that land, houses, offices, and other buildings owned, occupied, or used by diplomatic representatives⁴ and their staffs as embassies, legations, and the like—in this article referred to as diplomatic premises—are entitled to certain privileges and immunities.

¹ *Jurisprudencia Abadie-Santos*, vol. 61 (1942), Fasc. 149-51, No. 12,592, pp. 7-16: see *Annual Digest and Reports of Public International Law Cases*, 1943-5, Case No. 75.

² *Ibid.*

³ Cf. Hackworth, *op. cit.*, vol. iv (1942), p. 560.

⁴ Some obscurity appears to exist concerning the position of premises occupied for official purposes by commercial agents sent by one State to another to represent it in regard to a public service or business carried on by it; Oppenheim states that there is an 'absence of immunity' (*op. cit.*, p. 713, n. 1), but that 'special consideration should be shown by the local authorities to' such premises (*ibid.*, p. 771).

The necessity for such privileges or immunities has not been questioned or criticized. The principal immunity in the eyes of the writers on international law 'comprises the inaccessibility of [the premises] to officers of justice, police, or revenue, and the like, of the receiving States without the special consent of the respective envoys'.¹ Other privileges include, in particular, certain exemptions from taxation which are separately dealt with below.² Diplomatic premises, moreover, are probably not the proper subject of execution in the form of legal charges by way of mortgage or otherwise.³ In some States there exists a positive right of protection from unruly approach, insult, &c.⁴ This, however, seems to be not a true privilege or immunity so much as a right to call upon the receiving State to exercise particularly towards diplomatic premises within the jurisdiction its general duty concerning the property of all persons within its territory, and therefore probably exists to a greater or less extent in all States, even where not expressed in legislative enactments.

The immunities of diplomatic premises may, in general, be divided into inviolability, or the right of the envoy to exclude officials of the receiving State, and extritoriality, which is a compendious name for the rule that for some purposes certain legal acts and transactions committed on diplomatic premises are deemed not to have been committed within the territory of the receiving State. It will be seen that this rule is of a tenuous nature and of limited application. It has been invoked, and often rejected, in continental courts, but forms no part of the English law relating to diplomatic immunity. English law in this regard tends indeed to be restrictive in its attitude to such immunities, and to limit them to what is necessary to the foreign envoy for the performance of his ambassadorial functions.⁵ While it is clear that these immunities are enjoyed by the premises (be they a building or only part of a building) in which the work of the diplomatic legation is carried on, it is not clear whether and how far they extend to the private residences of the envoy, his family, his suite, and his staff in cases where these persons live away from the embassy. Some writers treat of the embassy and the residence as one, and it may be that that is, or was in earlier times, the normal state of affairs. Others use the term

¹ Oppenheim, *op. cit.*, p. 713. Cf. Satow, *op. cit.*, § 372, and *infra*, pp. 128-9.

² See *infra*, pp. 138-47.

³ See *infra*, pp. 136-7.

⁴ For a case on the United States Law protecting diplomatic premises from insult or attack see *Frend et Al. v. United States* (1938), 100 F. (2d) 691; *Annual Digest*, 1938-40, Case No. 161. And see Briggs, *op. cit.*, p. 791.

⁵ On the question whether English law is wider than is necessary or desirable, the Inter-Departmental Committee on Diplomatic Immunities reported in 1951: 'We do not think any question arises as to . . . the immunities attached to the embassy building and offices. . . . The practice of the Foreign Office is based on the principle that diplomatic immunity is accorded not for the benefit of the individual in question but for the benefit of the State in whose service he is in order that he may fulfil his diplomatic duties with the necessary independence.' (Cmd. 8460, p. 1.)

'residence' meaning also the legation building; few distinguish patently between the two. A number of writers use the term *hôtel*, which is in itself ambiguous. It may be that the true answer is that the premises in which an envoy or member of his suite, &c., lives, enjoy immunity if they are within the embassy building or if they are in the same district and occupied in connexion with the duties of the legation (one of the duties of an envoy being to reside at the seat of the Government to which he is accredited).¹ Any other property, such as a country house, a sea-side bungalow, or a shooting lodge, owned and occupied by a diplomatic person for his own recreation or convenience, would on that view have no immunity. It might indeed be difficult to contend that any interference with such property could constitute a *coactio* of the envoy so as to hinder him in the diplomatic functions for which he was sent and received.² It could amount at the most to annoyance, which cannot easily be established as a breach of the rule *ne impediatur legatis*.³ Any claim for immunity of such property could rest at most on comity.

Of the early writers, Grotius does not mention either the building in which the envoy officiates or that in which he resides. Bynkershoek⁴ deals with this topic only from the point of view of punishment for attacks on and insults to diplomatic premises. Vattel⁵ writes that the exemption of the envoy's goods does not extend to immovables, which are 'not attached to his person'; they remain under the jurisdiction of the territorial sovereign. However, he treats⁶ of the ambassador's *house*⁷ and *hôtel* as being immune from that jurisdiction: as regards the *house*, he explains that 'if the *residence* is the envoy's own property it is exempt'. Phillimore states that the ambassador's *house* is inviolable,⁸ although he later⁹ writes that the ambassador has no privilege in respect of immovables, by which must presumably be understood houses, &c., which are the personal property of an ambassador and not used for official purposes. Later still¹⁰ he writes: 'The *house*, or, as it is usually called, the *hôtel* of the ambassador is by universal consent

¹ See Hurst, *op. cit.*, p. 287.

² See *supra*, p. 118, and *infra*, pp. 137 and 150.

³ A difficulty arises in considering the position of a house owned by a diplomatic agent as an investment. He does not occupy it but receives the rent and profits. At first sight there would appear to be no ground for granting immunity to such a house—certainly not against entry or execution for non-payment of mortgage interest or rates or the like. But suppose that the rents constitute a good part of the diplomat's income enabling him to keep up the standard of living required of his office? In that case, cutting off the source of his income would seriously impede him in the discharge of his functions, and although the matter is not free from doubt it is submitted that he would then be justified in claiming immunity for the house in question.

⁴ *Op. cit.*, p. 27.

⁵ *Op. cit.*, pp. 115 ff.

⁶ *Op. cit.*, ch. 9.

⁷ Author's italics, and so throughout this section unless otherwise indicated.

⁸ *Op. cit.*, p. 24.

⁹ *Ibid.*, p. 35.

¹⁰ *Ibid.*, p. 210.

inviolable and inaccessible to the ordinary officers of justice or revenue',¹ and adds that this immunity extends to the ambassador's carriage. Wharton² echoes Vattel and Phillimore in stating that a diplomatic agent holds real or personal property, apart from what he holds as minister, subject to the local laws.³ Satow states that 'No officer of state and in particular no police officer, tax collector or officer of a court of law, can enter the residence of the diplomatic agent, nor without consent discharge any function therein',⁴ and cites the case of the servant of Admiral Apodaca, the Spanish Envoy in London in 1808, who was arrested in the legation for a criminal offence. Apodaca protested against the violation of his diplomatic privilege by the arrest of a servant, within his house, 'without previous notice'. The servant was released, and Satow considers it probable that verbal explanations were made to Apodaca and some apology offered.⁵ He asserts⁶ that the

¹ He cites in support: (i) Wiquefort, *De Legato*, 1, s. 28: 'La maison et les domestiques de l'ambassadeur sont inviolables'; (ii) Bynkershoek, *De Foro Leg.*, c. xxi: 'Aedes legati an prebent asylum' [which seems not apt]; (iii) Vattel, Book IV, ch. ix, s. 117: 'l'indépendance de l'ambassadeur serait fort imparfaite et sa sûreté mal établie, si la maison où il loge ne jouissait d'une entière franchise et si elle n'était pas inaccessible aux ministres ordinaires de la justice. . . . La maison d'un ambassadeur doit être à couvert de tout insulte sous la protection particulière des lois et du droit des gens: l'insulter c'est se rendre coupable envers l'état et envers toutes les nations'; (iv) Merlin, *Ministre Public*, v. 3.

² Op. cit., vol. i, p. 653.

³ Cf. Pessôa, op. cit., p. 133; Hatschek, *Outline of International Law* (trans. by Manning, 1930), p. 67. The Washington Project of the American Institute of International Law (*ubi supra*, p. 117) provides (§ 19) that 'diplomatic agents shall enjoy inviolability as to their person, their residence both private and official . . .'; but (§ 21) 'the private residence of the agent and that of the legation shall not enjoy the so-called privilege of extritoriality'. [As to this distinction see *infra*, p. 137.] 'No public judicial or administrative officer of the country to which the agent is accredited may enter the *domicil* of the latter or the legation without the assent of the said agent.' The Harvard Draft Convention (*vide supra*, p. 117) converts the immunity of diplomatic premises into a positive duty of the receiving State to which the envoy is accredited. S. 3, 'Protection of Premises', provides that 'a receiving State shall prevent its agents . . . from entering premises occupied and used by a mission . . . or by a member of a mission without the consent of the chief of the mission'. The Draft quotes the relevant legislation of several States.

⁴ Op. cit., § 372. (He adds: 'The immunity extends to carriages . . . and also to boats, and it may yet be to aeroplanes.') It will be observed that Satow does not use the word *hôtel*. The chapter is headed 'Immunity of Residence'. In § 380 he uses 'dwelling' and in §§ 382-3 'embassy or legation'.

⁵ Citing Villa-Urrueta, i. 304. He also cites (i) the case of *Sun Yat Sen* (see *infra*, p. 129), and (ii) the case of *Gallatin*, the American Minister in London in 1823 whose coachman was arrested in the stable of the embassy for an assault he had committed (outside the embassy). When the man was brought before a magistrate, the British Foreign Office refused to recognize his exemption from the local jurisdiction. He adds: 'As the outcome of this case, steps were taken by the British Government to ensure that no similar arrest of the servant of a foreign minister should in future take place without a previous communication to the minister, in order that his convenience might be consulted as to the method of putting the warrant into execution.' For the correspondence in this case see Satow, op. cit., 2nd ed. (1922), vol. i, p. 295. See also Wharton, op. cit., vol. i, § 94, and Hall, *International Law*, 8th ed. (1924), § 51. Oppenheim, op. cit., p. 725, n. 4, cites this case as showing that the rule of exemption of the private servants of the envoy from criminal jurisdiction does not in Great Britain apply to servants of the subordinate members of the diplomatic mission. But this person was the coachman of the minister himself. Oppenheim, moreover, makes no comment on the fact of the arrest having taken place on the embassy premises, despite an earlier reference (p. 713) to the 'inaccessibility' of such a place to officers of justice, &c. (Cf. *supra*, p. 126.)

⁶ Op. cit., § 380.

immunity extends to the *dwellings* of the minister's staff, which presumably includes the place where they reside if away from the embassy buildings.¹ As the local police have no right of arrest in the buildings, Satow observes that if a crime is committed there by a person who is nothing to do with the diplomatic mission staff, the offender should be handed over to the local authorities.²

Genet, who devotes a great deal of space³ to this topic, points out that the *hôtel* is often the property of the sending State, or at least the rent will be paid out of that State's public moneys. But it has a status of inviolability of its own. It is 'parcelle idéale du territoire national', where public officers give valid certificates to their own nationals; and if the child of an envoy is born there he will have the nationality of his parents. 'That inviolability is a consequence and corollary of the extritoriality of the place.'⁴

Oppenheim makes it clear that the 'immunity of domicile', as he calls it, 'is granted only in so far as it is necessary for the independence and inviolability of envoys, and the inviolability of their official documents and archives. If an envoy abuses this immunity, the receiving Government need not bear it passively'.⁵ Oppenheim explains this last sentence as referring to the right of affording asylum to criminals, which he discusses. He adds that if a crime is committed inside the house of an envoy [*sc.* on the legation premises] by an individual who does not enjoy personally the privilege of extritoriality, the criminal must be surrendered to the local government, and cites in support two cases which are more or less relevant: that of *Nikitschenko*,⁶ and that of *Sun Yat Sen*.⁷

¹ Satow (op. cit., § 381) quotes the Decree of the U.S.S.R. of 14 January 1927, Article 4 of which provides for the immunity of premises of diplomatic missions and the residences of staffs and their families. Such premises may be searched or seized only at the request or with the consent of the diplomatic representative and in the presence of a representative of the Procurator's department and of the People's Commissariat for Foreign Affairs. The premises may not be sealed up, nor is there any right of entry otherwise than with the consent of the diplomatic representative. There is no right of asylum in diplomatic premises for accused persons. (For the text see Briggs, op. cit., p. 767.)

² Op. cit., § 382.

³ Op. cit., pp. 435 and 540-8.

⁴ Ibid., p. 543.

⁵ Op. cit., p. 714.

⁶ Nikitschenko was a Russian who committed a crime within the precincts of the Russian Embassy in Paris in 1867. The French police were called in and arrested him. According to the widely accepted version of the case, the Russian Government demanded his extradition, on the ground that as the crime was committed inside the Russian Embassy it fell exclusively under Russian jurisdiction, or, at least, that the French courts lacked jurisdiction. The French Government refused extradition and Russia dropped the claim. See Oppenheim, op. cit., p. 714, n. 1. Cf. Satow, op. cit., § 382; Genet, op. cit., p. 544. This is probably the same case as that of *Mickilchinkoff* referred to by Hurst, op. cit., p. 201. According to Briggs, op. cit., p. 787, there was no demand for extradition—see *infra*, p. 133, for his more authoritative version.

⁷ Sun Yat Sen was a Chinese national who in 1896 was forcibly detained in the Chinese Legation in London. On an application for *habeas corpus*, the Court doubted whether a writ would issue against a foreign legation, and remitted the case to the diplomatic channel. The Chinese Minister contended that the British Government had no right to interfere as the house of the Legation was Chinese territory. But the British Government did interfere, and Sun Yat Sen was eventually released. See Satow, op. cit., § 383; *Mew's Digest*, vol. ii, p. 306; Short and Mellor, *Practice of the Crown Office*, 2nd ed. (1908), p. 318.

Hurst,¹ under the heading 'Property covered by diplomatic privilege', has the sub-title 'Embassy or Legation House', and says that 'no doubt exists that the *official residence* of the diplomatic agent is covered by the privilege . . . [which] . . . extends also to the premises used for official purposes', but only 'so long as it is occupied by a person entitled to the immunities'.

The existence—if not the extent—of the rule that diplomatic premises are entitled to exemptions is established in English law by the terms of the International Organizations (Immunities and Privileges) Act, 1950,² which enables Her Majesty by Order in Council to confer on certain international organizations and their representatives and other persons the immunities and privileges set out in the Schedule to the Act. Part I of the Schedule, headed 'Immunities and Privileges of Organisations', includes 'The like inviolability of official archives and premises occupied as offices as is accorded in respect of the official archives and premises of an envoy of a foreign sovereign power accredited to [Her] Majesty' and 'the like exemption or relief from rates and taxes as is accorded to a foreign sovereign power'. Part II of the Schedule, headed 'Immunities and Privileges of representatives of organisations [etc.]' includes 'the like inviolability of residence as is accorded to such an envoy'.³

Judicial decisions

In selecting the cases which follow, care has been taken to exclude so far as possible any which appear to depend on immunity of the diplomatic premises from the jurisdiction of the municipal courts.⁴ The ambiguity already mentioned, as to whether extritoriality or inviolability extends to diplomatic premises other than the legation building, does not recur in reported cases; indeed, in one of them⁵ it is made clear that immovable property belonging to a diplomat in his private capacity does not enjoy immunity. Nearly all the judgments are based on a consideration of the

¹ Op. cit., pp. 214, 215. Hurst cites two American cases: *United States v. Hand* (1810), Fed. Cas. No. 15297, where it was decided that the law of nations identified the property of a foreign minister with his person, so that an attack on it was equivalent to an attack on the minister and his sovereign; and *United States v. Jeffens* (1863), Fed. Cas. No. 15471, where the Court held that to take away a fugitive slave from the house of a Secretary of the British Legation was a breach of diplomatic privilege.

² Replacing and consolidating the Diplomatic Privileges (Extension) Acts, 1941, 1944, and 1946.

³ Part IV of the Schedule deals with immunities and privileges of the staffs of persons having immunities and privileges under Part II. It is no more precise than the earlier Parts cited.

⁴ For a case in which the judgment relied upon such immunity although it was not (*semble*) specifically pleaded, see *Angelini v. French Government: Annual Digest*, 1919-22, Case No. 206. For a case in which the plea of immunity was unsuccessfully raised by a third State, see *Suchet v. The French State: Gazette du Palais*, 28 March 1939; *Annual Digest*, 1919-42 (Supplementary Volume), Case No. 109.

⁵ *Immunity of Legation Buildings (Czechoslovakia) Case*: see *infra*, p. 137.

idea of extritoriality; few cases dealing with inviolability of the legation building have come under notice.¹

The topic of the 'inviolability of the ambassador's residence, that is to say, the legation' was, however, canvassed at length by the Judges of the Supreme Court of Canada in the *Rockcliffe Park* case,² who reviewed the principal authorities from Vattel³ onwards. Duff C.J. spoke also of the parallel rule of the immunity of the property of a foreign State devoted to public use in the traditional sense, concluding that there was 'no controversy . . . that this immunity from legal process extends to the property of the foreign sovereign devoted to public uses'.

In *Petrocchino's* case,⁴ the Civil Tribunal of the Seine showed that the immunity of diplomatic premises must be regarded from the point of view of what they were used for, not where they were situated. The plaintiff held a lease of certain premises which formed part of the buildings of the Swedish Legation in Paris. On the expiry of the lease, he claimed an extension under French landlord and tenant legislation. The Swedish State contended that such legislation could not apply to real property owned by foreign States in connexion with their embassies. The Court, however, held that 'the acquisition of real property by a foreign State does not *ipso facto* invest that property with the privilege of extritoriality' and that 'it is necessary that the property be completely appropriated to the service of the embassy'. In this case no such appropriation had been effected. Although the premises formed part of the buildings in which the Swedish Legation was established, the plaintiff occupied the whole of them and no part of them was ever used for the purposes of the Legation.

The question of the immunity of diplomatic premises has frequently been tested in continental courts by considering whether an act—sometimes a legal formality or 'act in the law', sometimes a criminal offence of some kind—committed on those premises should be deemed to have been committed within the State in which the premises actually stood, or outside it. The courts have invariably declined to hold that the principle of extritoriality required them to regard acts done on diplomatic premises as being acts done abroad.⁵ Thus in the case of *Gnome and Rhone Motors v.*

¹ But see the case noted *supra*, at p. 126, n. 4, and also *In re Chayet*, decided by the Supreme Court of Chile on 6 October 1932: *Revista de Derecho, Jurisprudencia y Ciencias Sociales*, vol. 30, p. 70; *Annual Digest*, 1931-2, Case No. 181.

² *In the Matter of a Reference as to the Powers of the Corporation of the City of Ottawa and the Corporation of the Village of Rockcliffe Park to Levy Rates on Foreign Legations and High Commissioners' Residences: Canadian Law Reports*, [1943] S.C.R. 208; *Annual Digest*, 1941-2, Case No. 106.

³ *Law of Nations*, Chitty's ed., Book IV, ch. 7, para. 92, and ch. 9, para. 117.

⁴ *Petrocchino v. Swedish State*: Clunet, *Journal de droit international privé et de la jurisprudence comparée*, 59 (1932), p. 945; *Annual Digest*, 1929-30, Case No. 198.

⁵ They have 'repudiated the view that an embassy or legation is foreign soil': Hurst, *op. cit.*, p. 200.

Gatteano,¹ the Italian Court of Cassation held in 1930 that a sale of goods which took place in the Italian Embassy in Paris and which was alleged to infringe certain patent rights, could not be deemed to have taken place on Italian territory; it took place in France. Similar principles were applied, with similar results, in a German case in 1920, arising out of an auction held in the building of the former Russian Legation in Berlin. In proceedings for recovery of 'turnover tax' (*Umsatzsteuer*) on goods bought in the sale, a German court held² that a legation building in a German State formed part of the territory of the Reich. Such a building was regarded for certain purposes as foreign territory, but the fiction of extritoriality had no relevance to the turnover tax. It does not seem to have occurred to anybody to point out that the premises had ceased at the time of the sale to be the Russian Legation, and to ask whether that might not have made a difference: one is left with the speculation that the Court took the view 'once a legation always a legation', a proposition which, it is believed, has yet to be seriously argued.

In 1930 another German court, applying a converse rule of law, held that employment in the German Embassy in London was employment 'abroad' and therefore did not entitle the applicant to unemployment benefit. The Court remarked that 'the principle of the inviolability of the premises of the official representation, although it is based on the principle of extritoriality, does not include the fiction that the house of the official representation is to be regarded as territory of the sending State'.³ In 1948 a French court had to consider the validity of the adoption by a United States citizen of a French child on the premises of the American Embassy in Paris, in the forms required by Californian law. The Civil Tribunal of the Seine held that the act of adoption must be in the form required by French law, seeing that, *inter alia*, the adoption took place in France. 'The premises of a foreign Embassy in Paris', said the Court, 'although inviolable, were none the less an integral part of French territory'.⁴

¹ *Rivista di diritto commerciale*, 2 (1930), p. 636; *Clunet*, 58 (1931), p. 762; *Annual Digest*, 1929-30, Case No. 199. Cf. *Munir Pasha v. Aristarchi Bey* (*Clunet*, 37 (1910), p. 551), an action by the Turkish Ambassador in Paris to recover money lent under a contract made in the Turkish Embassy. The Court held that the theory of extritoriality of the Embassy did not extend to 'actes de la vie civile' of this kind, and the defendant could not therefore claim that the agreement was contracted on foreign soil. See Hurst, *op. cit.*, p. 201.

² *Legation Buildings (Turnover Tax) Case: Juristische Wochenschrift*, 1923, p. 194; *Annual Digest*, 1919-22, Case No. 207.

³ *Status of Legation Buildings Case*, decided by the Adjudicating Senate for Unemployment Insurance of the German Federal Insurance Office: *Reichsarbeitsblatt*, 1930, Part IV, p. 390, No. 3841; *International Survey of Decisions on Labour Law*, 1930, Germany, No. 25, second case; *Annual Digest*, 1929-30, Case No. 197.

⁴ *Barat v. Ministère Public: Gazette du Palais*, 1948 (1^{er} sem.), Jurisprudence, p. 277; *Dalloz*, 1949, Jurisprudence, p. 368; *Annual Digest*, 1948, Case No. 102. Cf. *Re Basiliadis: Clunet*, 49 (1922), p. 407, where a marriage solemnized by a foreign priest (not by the ambassador) in a foreign embassy in Paris was held to be void, the embassy being for this purpose French territory and French law therefore applied.

In criminal proceedings in particular, arising out of offences committed in a foreign embassy, courts have refused to allow the accused to escape the consequences of his crime by pleading to the jurisdiction on the ground that the offence was committed abroad. The Civil Tribunal of the Seine rejected such a plea in 1909 in *Re Trochanoff*,¹ where the defendant, a Bulgarian, was charged with uttering menaces against the Bulgarian Minister in the Bulgarian Legation in Paris. For the defence it was pleaded that the building was 'foreign territory' and that menaces did not constitute a crime which could be prosecuted in France if committed abroad. The defence failed, and the man was convicted, the Court pointing out that the fiction of extritoriality is an inroad into the common law and is confined to an ambassador or minister, whose independence it is intended to protect. The place where an offence is committed cannot, merely because an ambassador or minister is concerned, be regarded as being outside the territorial limits of the jurisdiction.² The French Court of Cassation came to a similar decision in *Pacory's* case³ (which related to consular premises, although the judgment was given in general terms with express reference to diplomatic immunity). Pacory, the landlord of the premises, prosecuted for dealing with them in a manner contrary to the provisions of the French rent restriction acts, pleaded that the offence should by virtue of the principle of extritoriality be deemed to have been committed in foreign territory. The defence failed, the Court holding that 'the benefits of diplomatic immunity cannot be extended to persons other than diplomatic agents and their suites', i.e. cannot be extended to their landlords, 'and the fiction of extritoriality has the sole object of ensuring the inviolability of the residence of these agents', i.e. cannot be invoked to protect other persons who commit offences in or in relation to the 'residence'. In Belgium the Criminal Court of Brussels came to the same conclusion in 1929 in the case of *Procureur du Roi v. Chung and Others*.⁴ The accused, Chinese subjects, were arrested for a breach of the peace and insulting behaviour towards the Chinese Minister inside the Legation

¹ *Clunet*, 37 (1910), p. 551.

² Cf. the earlier case of *Nikitschenkoff*: *Journal du Palais*, 1866, p. 51 (translation in Briggs, op. cit., p. 787). N., a Russian subject, entered the Russian Embassy in Paris and assaulted certain of the Embassy staff. At the request of the First Secretary the French police entered the Embassy and arrested N. The accused pleaded that an assault committed by one Russian subject upon another in the Russian Embassy was committed 'in a place situated outside the territory of France and not governed by French law and to which the jurisdiction of the French courts cannot be extended'. The plea was rejected on the ground that the legal fiction in virtue of which premises occupied by foreign diplomatic agents are deemed to be situated outside the territory of the sovereign to whom they are accredited, is limited to protection of the person of the ambassador and his staff and cannot be extended.

³ *Ministère Public v. Dame Veuve Pacory* (1934): *Dalloz hebdomadaire*, 1934, p. 367; *Annual Digest*, 1933-4, Case No. 391.

⁴ *Clunet*, 57 (1930), p. 469; *Pandectes périodiques*, 1930, No. 367; *Annual Digest*, 1929-30, Case No. 200.

buildings in Brussels. They claimed that as the offence was committed in the Legation buildings they were covered by the privilege of inviolability enjoyed by diplomatic agents. The Court held that the rule of inviolability of the residence of a diplomatic agent 'does not assure the inviolability of third persons who do not belong to the embassy and who commit an offence on the premises of the country of which they are nationals'. In 1880 a German court had similarly held¹ that a crime committed on the premises of an embassy or legation by a foreigner who is not one of the suite, must be considered as having been committed on German territory. The crime is therefore justiciable by the German courts. The purpose of the fiction of extritoriality, it was said, is only to safeguard the personal privilege of extritoriality held under German law by the heads and members of suites (and their families) of diplomatic missions, and they are the only persons who may invoke that fiction. The Court concluded: 'The residence of an envoy accredited to the Government is domestic territory [*ist Inland*].'

On the other hand, it would seem that in some countries the court will not allow an accused person to use the argument that an embassy or legation is not foreign soil as a defence to a charge concerning a crime committed in a legation of those countries abroad. Thus when a number of persons were charged with having, by supplying false information, induced the passport authorities at the Hungarian Legation in Vienna to issue a passport, the Supreme Court of Hungary held that the offence was committed

'not abroad, but in the territory of the Hungarian State. The premises of the Royal Hungarian Legation which enjoyed the privileges of extritoriality, must be regarded as Hungarian territory. Accordingly, all acts committed there must be judged according to the rules of Hungarian law.'²

In a rather similar case in 1921, however, the Italian Court of Cassation took a contrary view. An Italian subject obtained by forgery a passport from an Italian consulate. The prosecution claimed that the crime should be treated as having been committed on Italian territory. It was held that a crime committed at an Italian embassy by an Italian not belonging to the diplomatic or consular service must be held to be committed abroad.³

The Italian courts have decided three interesting cases which turned on Article 15 of the Lateran Treaty of 11 February 1929.⁴ That Article

¹ *Anonymous*, decided by the *Reichsgericht*, Berlin, on 26 November 1880 (ii. 2691/80): *Clunet*, 9 (1882), p. 326; *R. G. St.* 3, § 70. Cited in Bruns, *Fontes Juris Gentium* (1931), Ser. A, Sect. II, vol. i, p. 135.

² *In re Soltan Sz* (1928): *Büntetőjogi Döntvénytár*, vol. xii, No. 4; *Annual Digest*, 1927-8, Case No. 252.

³ *Re Couhi*: *Clunet*, 49 (1922), p. 192; *Annual Digest*, 1919-22, Case No. 218; cited in Hurst, *op. cit.*, p. 202.

⁴ See *American Journal of International Law*, 23 (1929), Suppl., p. 187.

provided that certain properties outside the Vatican City '... although forming part of the territory of the Italian State shall enjoy the immunity guaranteed by international law to the embassies of foreign nations'. The first was a criminal case. In one of the properties in question, the Lateran museum, a theft was committed for which a certain Moriggi was convicted by the Court of Rome. He appealed on the ground that the Italian courts had no jurisdiction, because the crime was committed abroad. The Court of Cassation dismissed the appeal, saying that under the Treaty the Lateran museum enjoyed only such immunities as are granted by international law to the official residences of the diplomatic agents of foreign States. 'The properties used as residences of such agents are territory of the State in which they are situated and crimes committed therein must be regarded as crimes committed in the territory of that State.' In any event Article 15 of the Treaty made it clear that the properties were not foreign territory.¹ The second case² arose out of a contract of employment concluded in, and to be performed within, the Basilica. The defendants contended that the Italian courts had no jurisdiction. The Court of Rome dismissed the plea to the jurisdiction, holding that the contract was concluded in Italy and continued to operate in Italy despite the provisions of Article 15 of the Lateran Treaty, as to which the Court said:

'... the extraterritoriality of the seats of diplomatic agents means only that without their consent the local authorities may not carry out any acts therein. From the point of view of international law, a legation is part of the territory of the receiving State; those in the legation are inside the receiving State; a contract therein concluded is concluded within that State. It can therefore be stated that, even having regard to the accorded immunities, the contract of labour ... arose and operated in Italy.'

The third case³ arose out of the fact that the official residence of Cardinal Ragonesi, an official of the Holy See, at the time of his death was the Palazzo S. Uffizio, one of the buildings which belonged to the Holy See, but which was situated outside the Vatican City. The Court of Rome held that although the Cardinal was domiciled in the Vatican City he did not therefore have a foreign domicile; in view of the terms of Article 15 of the Lateran Treaty, the palace must be regarded as forming part of the territory of the Italian State. The decision was affirmed on appeal by the Court of Appeal of Rome,⁴ which held that the legal position of the buildings

¹ *In re Moriggi: Foro Italiano*, 64 (1939), ii, p. 303; *Annual Digest*, 1938-40, Case No. 172.

² *Fralleone v. Canons (Works Department) of the Archbasilica of the Lateran*, Court of Rome, 19 February 1938: *Foro Italiano*, 64 (1939), i, p. 296; *Annual Digest*, 1938-40, Case No. 41.

³ *Trenta v. Ragonesi: Rivista di diritto internazionale*, 28 (1936), p. 61; *Foro Italiano*, 60 (1935), i, p. 1725 (with a Note); *Annual Digest*, 1935-7, Case No. 93.

⁴ *Foro Italiano*, 63 (1938), i, p. 1259; *Annual Digest*, 1938-40, Case No. 173. The problem of the effect of extraterritoriality on domicile had already been considered by the courts of Peru. The Peruvian Minister to the Holy See and his sister who lived with him in Rome claimed to remain

mentioned in Article 15 'does not differ from that of the official residences of diplomatic agents. . . . The laws of Italy apply in respect of acts or facts which occur there [with exceptions as provided in the Treaty].'

Another immunity which is supported by several judicial decisions is the exemption of diplomatic premises from any form of seizure or execution—parallel to the prohibition contained in the Diplomatic Privilege Act, 1708, against the goods and chattels of an ambassador being distrained, seized, or attached by judicial process. For example, when in 1921 the District Court of Vienna ordered entry of a charge on the Land Register in regard to an embassy building belonging to a foreign State, on appeal, it was held by the Supreme Court that the order, being in the nature of an execution, must be quashed: 'Embassy buildings of a foreign State are not an object for execution.'¹ A somewhat curious case² occurred in Czechoslovakia in 1927, when application was made to a court for execution of an arbitral award by the compulsory sale of certain immovable property of the Hungarian State situate in Czechoslovak territory. So far as appears from the report in the *Annual Digest of Public International Law Cases*, the fact that the property belonged to an independent foreign State does not seem to have caused any concern, but when it transpired that the property was 'identical with the premises of the Legation of that State', the legality of the proposed execution was questioned. The Ministry of Justice, in agreement with the Ministry for Foreign Affairs,³ gave a decision to the effect that 'execution

domiciled in Peru by virtue of the extritoriality of a diplomatic minister and his household. The Supreme Court held that neither of them could be considered as domiciled in Peru. 'The fiction of extra-territoriality cannot establish the purely civil fact of domicile, since the immunities which international law accords the diplomatic representative, to assure his independence, do not modify the rules of private law to which he is subject in his own country': *In re Succession of Doña Carmen de Goyoneche* (1921): *Anales Judiciales*, 1921, p. 26; *Annual Digest*, 1919-22, Case No. 209. According to Genet (op. cit., p. 448), for the purpose of succession duty French courts regard property in a foreign embassy belonging to a diplomatic envoy dying in France as being situated in foreign territory. Conversely, succession duty is chargeable on property in a French embassy building abroad. Cf. the English case of *Heath v. Sampson* (1851), 14 Beav. 441, where the Sardinian Ambassador was held to have acquired a domicile in England. Romilly M.R. decided that the presumption as to domicile raised by the evidence of declarations of the deceased was not displaced by his appointment as Envoy Extraordinary and Minister Plenipotentiary of Sardinia for twenty years before his death. See also *Baron Arnold de Cartier de Marchienne v. L. A. de Cartier* (*Journal des Tribunaux*, 2 January 1949, p. 8; *Annual Digest*, 1948, Case No. 101), where the Court of Appeal of Brussels said: '... diplomatic representatives retain their domicile in the sending State however long their mission and however close their connection with the place to which they are sent'.

¹ *Legation Buildings (Execution by Hypothecation) Case: Entscheidungen des Obersten Gerichtshofes in Zivilrechtsachen*, iii (1921), No. 32, p. 69; *Annual Digest*, 1919-22, Case No. 208.

² Reported *sub nom. Enforcement of International Awards (Czechoslovakia) Case: Annual Digest*, 1927-8, Case No. 111.

³ In accordance with Law No. 79/1896, para. 31, s. 1 (as amended by Law No. 23/1928), which provides, according to the translation appearing in *Annual Digest*, 1927-8, at pp. 370-1:

'Against a person who in the Czechoslovak Republic enjoys the right of extritoriality, and in extritorial buildings and rooms, acts of execution may take place only in so far as international law permits. In doubtful cases, the court has to apply for a declaration of the Minister

by means of forced sale of premises of a foreign legation was according to international law not admissible'. It would appear that in this case the premises in question formed part of a larger building not used for diplomatic purposes. The Supreme Court held that the execution must be cancelled, observing:

'According to international law objects which directly or indirectly serve the purposes of the diplomatic service are exempt from the operation of municipal law. Consequently, as far as a building—as in the present case—is concerned, immunity extends not only to the building in which the diplomatic office is placed, but also to the dwellings of all diplomatic persons. The law speaks therefore not only of extraterritorial buildings but also of extraterritorial premises, i.e., of extraterritorial premises in buildings otherwise subject to territorial jurisdiction. On the other hand, when a diplomatic person possesses in the country a home or an agricultural estate or a factory, etc., for his own private purposes, such immovable property does not enjoy any exemption.'¹

This last proviso, excluding from immunity the private property of a diplomatic person, is noteworthy both for its categorical language and for its comparative rarity.²

One would expect the question to have come before the courts frequently, but if it has, few cases have been reported. Only one such case has been noted in the *Annual Digest of Public International Law Cases*. In 1925 the military attaché to the Italian Legation at Warsaw refused to quit a furnished flat at the termination of the lease. In proceedings for recovery of possession it was held by the Supreme Court of Poland that municipal courts have jurisdiction in regard to the private immovable property of a public minister, except in regard to such immovable property as is devoted to the official use of the embassy or legation.³ Puente cites⁴ an American case, *Byrne v. Herran*,⁵ where it was held that any building not used for official purposes was not exempt from a 'mechanics lien'—which is 'a species of lien . . . which exists in favour of persons who have performed work or furnished materials in and for the execution of a building'.⁶ Hurst⁷ cites two French cases⁸ to show that no clear distinction can be drawn

of Justice, who shall give it in agreement with the Minister for Foreign Affairs; such a declaration shall be binding upon the courts.'

By para. 39, the execution is to be cancelled:

'1. . . .

'2. if the execution is being conducted against objects, rights or claims which in accordance with any existing provision of the law are not subjected to execution.'

¹ 28 December 1929: *Važ.* 9491 civ.; *Annual Digest*, 1927-8, Case No. 251, *sub nom. Immunity of Legation Buildings (Czechoslovakia) Case*.

² For the thesis that the distinction between the official and private character of diplomatic agents is 'logical and necessary' see Lisboa, 'Extraterritorialité et immunités des agents diplomatiques', in *Revue de droit international et législation comparée*, 1899, Part I, p. 354, at p. 358.

³ *Montwid-Bialozor v. Ivaldi*: *Zeitschrift für Ostrecht*, i (May 1926), p. 272; *Annual Digest*, 1925-6, Case No. 246. See also *In re Khan*: *ibid.* 1931-2, Case No. 182.

⁴ *Op. cit.*, p. 116.

⁵ *Corpus Juris*, New York, 1926, vol. 40, p. 40.

⁶ *Foy v. Jarlsberg*: *Clunet*, 44 (1917), p. 588; and *De Bruc v. Bernard*: *ibid.* 11 (1884), p. 56.

⁷ 1 Daly (N.Y.) 344.

⁸ *Op. cit.*, p. 234.

between immovable property owned or occupied by a foreign representative on his own behalf and that which he occupies on behalf of his Government, a view which the learned author expounds at some length. It is submitted, however, with deep respect, that this view is not acceptable in its entirety.¹ In the first place, the general rule accords immunity to premises in diplomatic occupation, not to premises in the occupation of diplomats. Secondly, the basis and justification of the rule is *ne impediatur legato*. Where, then, a diplomatic agent owns or occupies property in a purely private capacity and for his own private purposes, entirely divorced from the business of his legation, it is at least conceivable that in some circumstances interference with that property will not amount to any hindering of the agent in that business. A refusal to extend the rule to such property in such circumstances may therefore be justified.

Taxation of immovable property

A special aspect of the problem of diplomatic immunity is the question whether premises occupied by diplomatic representatives—embassies, legations, and the like—are subject to the taxes generally imposed on buildings in the receiving State. The consensus of opinion is that such premises are not immune, but it would appear that in practice taxation of them is often not enforced. The early writers, such as Grotius and Bynkershoek, do not mention the subject at all. In 1789 G. F. de Martens wrote²: ‘Tous les biens immeubles doivent naturellement être imposés, même l’hôtel.’ This view is followed by nineteenth-century writers, such as Wheaton,³ Phillimore, who excluded taxes on real property from ‘the privileges which the usage of nations has imparted to the ambassador, and which are not derived from the reason of the thing’,⁴ and Wharton,⁵ who thought that any exemption of legation premises should be based on reciprocity and pointed out that the owner of the premises—who would often not be the diplomatic agent or the sending State—was not himself exempt from ‘all lawful taxes’. According to Dalloz,⁶ on the other hand, ‘Immovables, *except the hotel*, are subject to tax.’

One of the first to give a basis for the rule that diplomatic premises are not exempt from taxation as of right was Droin,⁷ according to whom tax is

¹ A possible alternative to the view is submitted at p. 150 *infra*. See also *supra*, p. 124.

² *Précis du droit des gens* (1789), vol. 7, pp. 196–8: cited in Droin, *L’Exterritorialité des agents diplomatiques* (1895), p. 159. See also Heffter, *Das Europäische Völkerrecht*, vol. i (8th ed., 1881), ch. iii, § 217: cited *ibid*.

³ *Op. cit.* 3rd ed. (1845, by Boyd), p. 346; 6th ed. (1929, by Keith), who states (at p. 465) that ‘In some cases the tax is not exacted in whole or part, either generally or on reciprocity.’

⁴ *Op. cit.*, p. 209.

⁵ *Op. cit.*, vol. i, p. 652. Cf. Puente, *op. cit.*, p. 118.

⁶ *Répertoire*, Art. ‘Agent diplomatique’: iii, § 145.

⁷ *Op. cit.*, p. 168. He cites Odier (*Des Privilèges et immunités des agents diplomatiques* (1890), p. 363) as saying that the fact that such a tax is but rarely claimed from a public minister leads

payable on immovable property because 'everything concerning land is subject to the forum of the State'. This, however, is too facile; and is difficult to uphold in the face of the immunity from the jurisdiction of the courts of the receiving State universally accorded to diplomatic premises. Lisboa¹ comes nearest to a true evaluation of the position and demonstrates that there can be no basis in international law for claims of immunity from taxes on immovable property. As he points out, the right of extritoriality is not involved. The only test of a valid claim to immunity is the necessity for or the convenience of the exemption in regard to the independence which ought to be assured to the diplomatic agent. The latter's liberty of action is in no way lessened by the fact that he is subjected to taxation, albeit heavy, of premises occupied by him—as long as all attempts to recover the tax are made through the diplomatic channel.² According to Satow,³ a house or land occupied for diplomatic purposes is exempt from income tax levied on its occupation or ownership, but he states that the premises enjoy no other exemption from taxation. To sum up: no rule of international law exempts the *hôtel* of an ambassador from the taxation which is imposed on all buildings within the State in which the *hôtel* is situate. Many Governments refrain from collecting the tax, either unilaterally or in return for reciprocal treatment of their embassies abroad. The requirement of reciprocity is indeed an indication that the exemption from tax is something over and above the provisions conferred or required by international law.

That that is so is borne out also by the fact that the exemption of diplomatic premises from taxation is in some States expressly granted by legislation⁴ or in treaty provisions having the force of law. Thus the Lower

diplomatic agents to believe that they are not bound to pay it; but the abstention from claiming is 'pure courtesy'.

¹ Op. cit., p. 363. He adds that to exempt him from the tax 'would have an air of charity which it were not dignified to accept'. He suggests, unconvincingly, that another reason why diplomatic premises should not be exempt from taxation is that otherwise foreign Governments could become landed proprietors of a large part of a town and so deprive the Treasury of an important part of the public revenue. See, however, Bishop, 'Immunity from Taxation of Foreign State-owned Property', in *American Journal of International Law*, 45 (1951), pp. 239–58, who thinks that the amount of revenue which would be lost would be too small to offset the friction and bad feeling likely to be aroused by an insistence on payment of tax.

² According to the *Washington Project of 1925*, § 24: 'Diplomatic agents should be exempt in the country where they are accredited (1) . . . , (2) from all land taxes on the legation building.' This provision does not amount to exemption of the building itself. Cf. *Harvard Draft*, § 4 (1): 'Exemption as to Premises. The receiving State shall not impose any taxes and charges whether national or local upon . . . movable or immovable property owned leased or possessed by the sending State for the purpose of its mission [except] charges for special services or assessments for local imposts.' On American practice see Hackworth, op. cit., vol. v, p. 576.

³ Op. cit., p. 215.

⁴ The texts of the 'Diplomatic and Consular Laws and Regulations of various Countries', including laws which exempt diplomatic agents from taxation, are to be found in the work of that name by Feller and Hudson (2 vols., Washington, 1933). The texts are arranged by States. For an early English Statute containing an exemption in favour of houses of foreign ministers see the Land Tax Act, 1692, Section 32.

Austria Increased Value Tax Act¹ contains exemption 'in case of extraterritoriality'.² In the Lateran Treaty of 1929 between Italy and the Holy See,³ Article 15 provides that certain properties mentioned in Article 13 and forming part of the territory of the Italian State 'shall enjoy the immunity guaranteed by international law to the official residences of the diplomatic agents of foreign States', and Article 16 provides that these buildings 'shall be exempt from all taxes whether ordinary or extraordinary, whether levied by the State or by any other entity whatsoever'.⁴ If exemption from taxes was part of 'the immunity guaranteed by international law' to the buildings, the Treaty would not have had to provide expressly for it in a separate Article.

In the United Kingdom no tax is levied on property occupied by a person entitled to diplomatic immunity unless there exists a person not entitled to such privilege who can be charged with the tax. As regards the profits of ownership, the Income Tax Act, 1952, Section 111, provides: 'Tax to be charged under Schedule A [i.e. tax on property in land in the United Kingdom] in respect of any house or tenement occupied by the accredited minister of any foreign State shall be charged on and paid by the landlord or other person immediately entitled to the rent of the house or tenement.'⁵ Similarly, property occupied for diplomatic purposes by any member of the official or domestic staff (except a British subject employed as a domestic) of a minister is exempt from Schedule B tax [on the occupation of land in the United Kingdom] if it is owned by a privileged person.

Rates

Rates are imposts assessed and levied by local government authorities on properties within their area, to meet their expenses in carrying out their civic functions and obligations, such as the lighting and paving of roads, the policing of towns, the supply of water, and the like. Although we deal with them under a separate head from taxes levied on property by the central government and comprising part of the national income,⁶ the dis-

¹ Cf. the Law of 13 July 1921, exempting from fees and taxes buildings which housed diplomatic representatives: cited in Feller and Hudson, *op. cit.*, vol. ii, p. 56.

² See *In re Khan: Annual Digest*, 1931-2, Case No. 182.

³ See *American Journal of International Law*, 23 (1929), Suppl., p. 187.

⁴ Cited in *Fralleone v. Canons (Works Department) of the Archbasilica of the Lateran: supra*, p. 135. Cf. *Trenta v. Ragonesi: supra*, p. 135.

⁵ Cf. Halsbury, *Statutes*, vol. 31 (2nd ed., 1952), pp. 83, 104. The provision echoes that in Section 32 of the Land Tax Act, 1692: 'Assessments on Houses of foreign Ministers to be paid by the Landlord.' Neither the Act of 1952 nor that of 1692 deals in terms with the case of diplomatic premises owned by the ambassador or the foreign State. See also the International Organizations (Immunities and Privileges) Act, 1950: *supra*, p. 130.

⁶ Cf. a similar distinction in the *Harvard Draft, supra*, p. 117. Lisboa (*op. cit.*, p. 363) distinguishes between taxes which are permanent and raised as part of the general revenue of the State and those which are for certain specific services. From the former the legation premises are exempt, from the latter they are not.

tion is largely conventional. At the same time, there is this difference: While, as we have seen, general agreement exists among writers that there is no rule of international law which exempts diplomatic premises from taxes, there appear to be two schools of thought on the question of whether such premises are or are not immune from local assessments for rates. There are those who hold that the legation buildings are liable to be rated in the same way as other premises, and what they have to say in support of that thesis is, it is submitted, cogent and precise. Wharton, for example,¹ states that legation premises are not specially exempt from local assessments, water rent, and the like, unless there is a definite arrangement on a basis of reciprocity. Heffter² asserts that there is no immunity for diplomatic premises from taxes for the upkeep of roads, bridges, and canals, although exemption is sometimes granted as a matter of courtesy. Pradier Fodéré³ argues that, rates being imposed on the inhabitants of a place as such, they are payable by the occupiers of diplomatic premises within that place. And Genet⁴ pays special attention to rates, which he calls 'remunerative' taxes, that is, those paid to local authorities in respect of public services—highways, lighting, cleaning, &c. He sees no reason to grant exemption to diplomatic premises; the local authority is working as much in the interests of the occupiers of such premises as in that of the rest of the community, and they should pay rates accordingly.⁵ Again, according to Wheaton's *Elements*,⁶ the *hôtel* in which a foreign minister resides is subject to taxation in common with the other real property of the country whether it belongs to him or to his Government. To this the learned Editor of the sixth edition⁷ of his work adds: 'although in some cases such taxation and rates are by courtesy not exacted in whole or part either generally or on reciprocity, but only by courtesy'.⁸ Turning, finally, to *Ryde on Rating*,⁹ we read that:

'There being no means of enforcing the poor rate against ambassadors and their servants, it follows that the houses owned by such persons cannot be effectively rated.

¹ Op. cit., vol. i, p. 652.

² Op. cit., s.v. Diplomatic Immunity, vol. iii, § 217, cited in Droin, op. cit.

³ *Traité de droit international public* (1885-1906), p. 1414.

⁴ Op. cit., p. 445.

⁵ The views of these French writers seem to run counter to the version given in the judgment of Duff C.J. in the *Rockcliffe Park* case: 'The rule followed by France in relation to the property of foreign states occupied by diplomatic agents accredited to the French government for diplomatic purposes (stated in the memorandum of M. Caillaux), that such property is exempt from land tax levied by the general government, as well as from departmental and communal taxes in respect of such property, has, as we have seen, been justified in France on the ground that such property is considered as a dependency of the foreign territory "*et fictivement distraites [distinctes?] du territoire français*".' (See *Annual Digest*, 1941-2, p. 346.)

⁶ Dana's edition, § 242.

⁷ Sixth edition by Keith (1929), vol. i, p. 405.

⁸ Cf. Heffter, *ubi supra*; and see *Clunet*, 32 (1905), pp. 489 and 1179, for an account of the following incident: in 1903 the Austro-Hungarian, Italian, and Russian Ministers in Paris claimed that they were exempt from a tax imposed in 1900 for the collection of refuse. The Municipal Council of Paris gave way 'as a matter of courtesy' by making a nil assessment on the premises of the three Embassies.

⁹ Ninth ed. (1950), p. 97.

The exemption attaches to the occupation and not to the thing occupied. . . . A house belonging to a foreign ambassador and let to a stranger being an ordinary British subject, would not be exempt, because there would be nothing to prevent a distress of the occupier's goods.'

This, it is submitted, gives a true picture of the situation: the premises themselves are not exempt from rates; the exemption is enjoyed by the occupiers if they are entitled to diplomatic immunity, and if so their goods are immune from seizure.

On the other side, maintaining that diplomatic premises themselves are entitled to immunity, stand equally eminent writers whose assertions, however, do not always bear close scrutiny. Westlake,¹ for example, quotes Wheaton but adds: 'It has been held in England that payment of local rates cannot be enforced by suit or distress against a member of a mission'—which shows something less than immunity of premises. Oppenheim² treats of rates in a section devoted to privileges of envoys; the latter 'need not pay either income tax or other direct taxes'. The passage continues:

'As regards rates, it is necessary to draw a distinction. Payment of rates from which an envoy himself derives benefit, such as sewerage, lighting, water, night watch and the like, can be required of the envoy, *although often this is not done*. Other rates such as poor rates and the like, he cannot be requested to pay.'

Oppenheim gives as authority for the italicized words the rule that in England the payment of local rates cannot be enforced by suit or distress against a member of a legation (an echo of Westlake), supported by the two cases of *Parkinson v. Potter*³ and *Macartney v. Garbutt*.⁴ He gives no authority for saying that an envoy 'cannot be requested to pay' any rates; and here he also has stopped short of saying that no rates can be levied on diplomatic premises.

A modern writer⁵ on the specialized subject of rating asserts the position in the United Kingdom to be that ambassadors and members of foreign embassies and legations, and their servants, are not rateable for offices or residences occupied by them. He bases this rule on the Diplomatic Privilege Act, 1708: since their goods may not be distrained by process, they cannot be compelled to pay rates.⁶ It makes no difference that the person in question happens to be a British subject, unless the British Government has, on accepting him as a member of the diplomatic corps, made a stipulation that he shall be liable to pay rates.⁷ It is not easy to accept these propositions. They treat the payment of rates as being a personal liability

¹ *International Law* (1910), Part I, p. 278.

² *Op. cit.*, p. 718.

³ (1885), 16 Q.B.D. 152; see *infra*, p. 145.

⁴ (1890), 24 Q.B.D. 368; see *infra*, p. 145.

⁵ Konstam, *Modern Law of Rating* (1927), p. 84.

⁶ See *Parkinson v. Potter*, *infra*, p. 145.

⁷ See *Macartney v. Garbutt*, *infra*, p. 145.

and regard the exemption from paying rates as being a personal immunity of the diplomatic agent. It is not necessary here to discuss whether the former assumption is correct. For the present purpose rates may be regarded as imposed on the building, and if exemption from rates existed, it would be an immunity attached to the diplomatic premises. But there is not in fact such an immunity. The Acts of Parliament, from 1602 onward, under which local authorities in England and Wales are empowered to levy rates, contain exemptions for certain classes of building, such as church schools, but not for premises in diplomatic occupation. Apart from the specified cases, there is no exemption from the payment of rates, even though the services for which the rate is levied might not all be enjoyed by the individual ratepayer. Premises occupied by the representatives of foreign governments are rateable, and rates are payable in full to the local authority. In practice, however, reciprocal arrangements concerning the rating of premises in diplomatic occupation have since 1892 been concluded by the Government of the United Kingdom with nearly all the States having diplomatic missions in London. By these arrangements the missions are relieved of the payment of a certain proportion of local rates leviable on their premises, namely, that part of the rate which is attributable to what is known as 'non-beneficial' municipal services, viz. those from which the missions are deemed not to derive a direct benefit. These services include, for example, the provision of police, baths and washhouses, public libraries and museums, &c.; and rates levied in respect of such matters—which represent about two-thirds of the total rate—are borne by Her Majesty's Government. On the other hand, that part of the rate attributable to 'beneficial' services—such as main drainage, fire service,¹ street lighting, cleaning and maintenance, and the removal and disposal of domestic refuse—is paid in the first instance by the Foreign Office, to whom it is repaid, on application, by the foreign mission. (Water rate, being a charge for a commodity consumed, is paid direct by the mission as occupier.²) The relief in respect of the 'non-beneficial' portion of the rate is granted in regard to occupation of premises owned or leased either by the foreign State concerned or by individual members of a mission who are entitled to diplomatic privilege. Where the premises are leased, it is immaterial

¹ The reason why the fire brigade is placed in a different category from the police is doubtless because provision of police services is part of the special duty of protection owed by the receiving State to diplomatic agents and their property within its realm (see *supra*, p. 126), and the agents should clearly not be called upon to pay for such services.

² For the exclusion of water rates from reciprocal arrangements of this kind see Puente, *op. cit.*, p. 118. See also *American Journal of International Law*, 26 (1932), Suppl., p. 115, where it is pointed out that there is no duty on the part of a receiving State to furnish gas or water gratuitously to the members of foreign diplomatic missions or to donate to their premises special benefits by way of street improvements or the like. Hill, however (in *A.J.* 25 (1931), p. 268), cites a report in the *New York Herald Tribune* of 10 October 1929 that the German Ambassador to the United States refused to pay his water rates and his immunity was upheld.

whether the individual pays the rates direct or to his landlord as part of an inclusive rent.

The arrangement is a reciprocal one, that is, it is a condition that Her Majesty's diplomatic servants in the sending State concerned shall not be called upon to make any payments in respect of 'non-beneficial' services there, or of any direct or indirect charges of an analogous nature.¹ Here again, the requirement of reciprocity is an expression of the fact that exemption or relief from rates is not one of the immunities conferred by international law on diplomatic property: it is accorded merely out of courtesy. The most that an envoy can claim is freedom from process. (It will be appreciated that where no such arrangement as we have described has been made, in the event of the non-payment of rates assessed on diplomatic premises, all furniture and effects on the premises are privileged from seizure² and the local authority is left without a (judicial) remedy.³) It has been thought necessary to deal at some length with the topic of immunity from rates in view of the examination made in the next section of the *Rockcliffe Park* case.

Judicial decisions on the subject of rating

Reported cases concerned with the rating of diplomatic premises are few in number.⁴ Two nineteenth-century cases frequently cited are *Parkinson v. Potter*⁵ and *Macartney v. Garbutt*.⁶ Both cases were founded on a local Act⁷ operating in the Parish of St. Marylebone in London—a district where are many embassies and legations—which enables the local authority to recover the rates of diplomatic premises from the landlord,⁸ by providing that 'Every rate or assessment . . . in respect of any . . . house . . . which

¹ Circular Letter of Lord Salisbury, 19 July 1892: F.O. ref. 1233 [18864]. I am indebted to Sir Gerald Fitzmaurice, Legal Adviser to the Foreign Office, and to the Protocol Department for the above details. Cf. Satow, *op. cit.*, p. 400.

² Diplomatic Privileges Act, 1708: see *supra*, p. 119.

³ 'The only remedy . . . is by appealing to the authorities of the country from which the ambassador is accredited': *per* Mathew J. in *Parkinson v. Potter* (1885), 16 Q.B.D. 152, at pp. 157-8.

⁴ In the early case of *Novello v. Toogood*, 14 C.B. 487, it was held that the goods of one engaged as chorister in a legation were not privileged from distress, but that was because he carried on a separate business in the house where the distraint was made.

⁵ (1885), L.R. 16 Q.B.D. 152.

⁶ (1890), L.R. 24 Q.B.D. 368.

⁷ 35 Geo. 3, c. 73, s. 190. See also the Metropolitan Police Act, 1829, s. 27. For a list of other similar local Acts see *Ryder on Rating*, 9th ed. (1950), p. 97.

⁸ Part of the rent of the premises will then comprise rates—of the payment of which, as we have seen *supra*, the Foreign Office will arrange for the foreign mission to be relieved. Jones, in this *Year Book*, 25 (1948), pp. 274-5, shows how, in 1872, it was established that a landlord was not liable for accumulated taxes on the departure of a privileged tenant. The owner of a house formerly occupied by the Haitian Legation was called upon to pay rates, from the payment of which his former tenant had been acknowledged to be exempt. His protests were supported by the Foreign Office, who pointed out that rates should not have been levied while the house was used as a legation and it would not be fair to levy them retrospectively on the landlord. Upon the receipt of this representation the Home Office took steps to have the demand withdrawn.

any ambassador . . . or other public minister, or any other person not liable by law to pay such rate or . . . assessment . . . shall inhabit, shall be paid by and recoverable from the landlord.' In *Parkinson v. Potter*, the Court of Appeal held that De Bastos, an Attaché of the Portuguese Embassy, was within the privilege and so a 'person not liable by law to pay such rate'. After discussing several reported cases on the immunity from process of diplomatic agents, which was not in point seeing that the Attaché in question was neither made nor sought to be made a party to the action, the Court was of opinion that De Bastos was not liable to pay rates assessed upon him in respect of his occupation of his residence. The plaintiff, his landlord, was liable to pay them. Nothing in the long, and reasoned, judgments in this case goes to show that any building occupied by a member of an embassy enjoys immunity from rates.

Macartney v. Garbutt was an action to recover money paid under protest 'to get rid of a distress' levied on the furniture of the plaintiff under a claim for rates assessed on his house. Mathew J. held that the plaintiff's furniture was not liable to seizure; though he was a British subject, he was Secretary to the Chinese Legation and so 'not liable by law to pay such rate'. Here again, the judgment was *in personam*.

In the *Rockcliffe Park* case,¹ the Supreme Court of Canada held that rates could not be levied on buildings used as legations. The judgment is open to criticism, and it is with respect submitted that the minority opinions are in fact to be preferred. The case originated with a reference by the Governor-General of Canada to the Court of the question whether it was within the powers of the Corporations of the City of Ottawa and the Village of Rockcliffe Park to levy rates on, *inter alia*, certain properties owned and occupied by foreign legations. The Court held by a majority of three Judges to two that such premises were exempt from rates. Duff C.J., in a lengthy judgment, dealt with diplomatic immunities in general and with the fiction of extritoriality. On the subject of immunity from taxation, he divided imposts on property into two classes:

' . . . those which constitute payment for services rendered for the beneficial enjoyment of the particular property in respect of which they are assessed, and those which are levied for general purposes. As regards the first class, water rates may perhaps be taken as typical. There is, of course, no obligation upon a State which receives an envoy from a foreign State to provide him gratuitously with water, or electricity, and it would be generally agreed that where a tax is in the nature of the price of a commodity, the person enjoying the benefit of that commodity ought to pay the price. As regards taxes (strictly so-called), they are imposed by the authority of the State, whether immediately, or mediately, through a municipality, or other agency. . . .'²

¹ *In the Matter of a Reference as to the Powers of the Corporation of the City of Ottawa and the Corporation of the Village of Rockcliffe Park to Levy Rates on Foreign Legations and High Commissioners' Residences: Canadian Law Reports*, [1943] S.C.R. 208; *Annual Digest*, 1941-2, Case No. 106.

² *Annual Digest*, 1941-2, Case No. 106, at p. 342.

The exaction of 'such tribute', he thought, 'cannot be demanded by one equal sovereignty from another, or from its diplomatic agent'; it is 'not exigible, consistently with the principles of the law of nations'. That said, he brushed aside instances of other fees, duties, and imposts exacted from diplomatic agents, and applied himself to the question

'whether a tax imposed by a statute in general terms in respect of the ownership and of the occupation of real property, or levied upon real property itself, extends to the case where such property is owned, and occupied, by a foreign State, or its diplomatic service, and is employed for the public diplomatic purposes'.¹

(All the Judges in this case use the terms 'taxes' and 'rates' indifferently, but it is clear that they are referring to rates imposed by a municipality.) The learned Chief Justice then cited, *inter alia*, the case of *Parkinson v. Potter*² (but not *Macartney v. Garbutt*³) and many authorities, from Vattel⁴ to *Stephen's Commentaries*,⁵ and concluded:

'The general result appears to be that in England, taxes and rates . . . are not recoverable from diplomatic agents in respect of real property occupied . . . or owned by them. . . .'⁶

This seems unexceptionable; but when he adds 'Such a statute creates no liability to pay', he asserts a proposition which is not easily demonstrable. He then considers whether the statute can create any effective charge on the property. The enforcement of the charge would amount to *coactio*, from which the foreign State [*sic*] and its ambassador are immune; and even if the property were transferred, the charge could not stand against a purchaser as 'obviously the charge would affect the price for which the property could be sold. The creation of the charge would thus amount to the creation of a *jus in re aliena*, to a subtraction from the property of a foreign sovereign.'⁷ Rinfret J. found the solution of the problem of the immunity of diplomatic premises in the machinery adopted by municipal corporations to collect their taxes. He thought it would be an empty procedure to assess taxes on property owned and occupied by foreign States, for, 'as they are uncollectable', the municipality would find itself at the end of the year with a deficit to the extent of these uncollectable taxes.

In dissenting judgments by Kerwin and Hudson JJ., however, the former saw nothing to prevent the ordinary procedure of assessing and

¹ *Annual Digest*, 1941-2, Case No. 106, at p. 342.

² *Supra*, p. 145.

³ *Ibid.*

⁴ *Law of Nations* (Chitty's ed.), Book IV, ch. 7, para. 92.

⁵ 'The Ambassador's house is for many purposes treated as though it were a part of the territory of the State by which he is accredited. Accordingly, it is not subject to the jurisdiction of the English Courts; and the Ambassador is not liable to pay rates or taxes in respect of it.' *Stephen's Commentaries on the Laws of England*, 20th ed. (1938), vol. i, p. 153. No authority is quoted for this categorical assertion, which is repeated in the 21st ed. by Warmington (1950), vol. iii, p. 21. Both these editions purport to be textbooks for students. There is no mention of exemption from rates or taxes in earlier editions, e.g. the 18th, edited by Jenks (1925).

⁶ *Loc. cit.*, p. 344.

⁷ *Ibid.*, p. 345.

claiming taxes, whatever might be the ultimate result thereof, and the latter held that the power of the municipality to impose taxes on diplomatic property was not removed but only 'qualified by the fact that assistance of the Courts would not be given to enforce payment so long as the diplomatic immunity continued'.¹ Hudson J. then answered the Lord Chief Justice's asseveration that 'such a statute creates no liability to pay', by holding, correctly, that 'the immunity or privilege is a privilege from action or molestation. It does not destroy liability.'² 'A diplomatic representative', he pointed out, 'often incurs liability under contracts. If he pleads immunity, these cannot be enforced as long as the privilege continues, but he still owes the debt.'³

As regards rates, Hudson J. stated that these are 'imposed on the land for the purpose of maintaining the community life and amenities shared by the inhabitants of the municipality, including the occupants of these particular properties, with all citizens. It is in no way a tax enuring for the benefit of Canada as a state.'⁴ He recalled, pertinently enough, that the Statute of Anne had no application to land: 'At the time it was passed and for long afterwards, alien ownership of land was not permitted by the law of England.'⁵ Finally, Hudson J. concluded:

'The tax when imposed creates a lien and charge on the land. There are many difficulties in the way of enforcement as long as the privilege continues, but, as we have reason to know, diplomatic relations may be severed, or the foreign state or person representing such state may desire to dispose of the land; then the lien might well become effective. Again, a substantial part of municipal taxation is imposed to pay for the services rendered by the municipality, such as water, sewerage, etc., which the municipality would have a right to withhold until taxes are paid.'⁶

The majority decision in the *Rockcliffe Park* case, namely, that diplomatic premises are exempt from rates, is still law in Canada. It may be that on the material before the Lord Chief Justice and his concurring brethren, the decision was inevitable. However, careful reading of their judgments suggests that had better or other available material been presented, the Court might have arrived at a different conclusion.

V. Conclusion

The measure of confusion which exists in the writings of acknowledged authorities and in the minds of learned Judges with regard to the origin and scope of privileges and immunities of diplomatic representatives and their property is susceptible of clarification if regard is had to an historical

¹ Loc. cit., p. 350.

² Ibid., p. 351, citing *Dickinson v. Del Solar*, [1930] 1 K.B. 376.

³ Loc. cit., p. 351.

⁵ Citing *Blackstone's Commentaries*, 1829 ed., vol. i, p. 371.

⁶ Loc. cit., pp. 351-2.

⁴ Ibid.

analysis of the basis of the need for such privileges and immunities. In the beginning, as has been seen, Grotius laid it down that *omnis coactio abesse a legato debet*:¹ the ambassador must be allowed to carry out his function of diplomacy, of representing the sovereign who sent him. The sovereign to whom he is accredited must do nothing and allow nothing to be done which will make it difficult for the ambassador to carry out that function. After Grotius, there arose the theory of extritoriality, the theory that an ambassador should be treated, juridically, as though he were not present in the State to which he is accredited. This is a palpable fiction, which hardly provides a basis upon which to build a body of legal rules. Still less is it a satisfactory foundation for a series of privileges and immunities which derogate from the jurisdiction of courts and place a selected number of persons and their property in a position different from and in many respects superior to that of others under the protection of the territorial sovereign.²

The modern view, which is a reversion to that of Grotius,³ holds that privileges are granted to diplomats and their property because the diplomats could not exercise their functions perfectly unless they enjoyed such privileges.

'For it is obvious that, were they liable to ordinary legal and political interference like other individuals, and thus more or less dependent on the good will of the [*sc.* receiving] Government they might be influenced by considerations of safety and comfort to a degree which would materially hamper them in the exercise of their functions.'⁴

It is on the conception of function, the necessity of assuring free communication between sovereign States, that the grant of privilege must be based, and it is by that conception that it must be tested and, if necessary, defended. While it is open to States to grant, by legislation or by executive action, to diplomatic agents stationed within their territories whatever privileges and immunities they please, there is required of them by international law a certain minimum. That minimum comprises such amount of privileges and immunities as will permit the diplomatic agents to carry out their functions without hindrance or avoidable difficulty. Nothing less will ensure compliance with the maxim *ne impediatur legato*. Nothing more, on the other hand, need be granted or is appurtenant to the right of legation. To paraphrase—with, it is submitted, justification—the words of a learned

¹ *De jure belli ac pacis*, L. ii., c. xviii, s. ix.

² On the alternative theory that the representative character of the diplomatic agent 'equates the immunity of the agent with those of the sending State itself', see Preuss, 'Capacity for Legation and the Theoretical Basis of Diplomatic Immunities', in *New York University Law Quarterly Review*, vol. 10, pp. 170–87. But 'the immunity of a foreign government and its ambassador as regards property does not stand on the same footing', *per* Lord Maugham in *The Cristina*, [1938] All E.R., at p. 738.

³ See Oppenheim, *op. cit.*, § 389: 'The modern tendency among writers is towards rejecting the fiction of extritoriality.'

⁴ *Ibid.*, § 385. See also Hurst in this *Year Book*, 10 (1929), p. 4.

writer¹ concerning State immunity: at a period in which in enlightened communities the securing of the rights of the individual in all their aspects has become a matter of special and significant effort, there is no longer a disposition to tolerate the injustice which may arise whenever a defendant screens himself behind the shield of diplomatic immunity in order to defeat a legitimate claim. Similarly, it may be argued, there is a tendency not to accept uncritically a system which permits the ambassadorial office to be used as a cloak for evading the payment or performance of what is due or the observance of legislative enactments which bear upon others residing in the State to which the minister is accredited.² There is a need therefore to inquire into and, if possible, establish the extent of the immunities which States are required by international law to accord to diplomatic agents and their property.

As regards movable property, it is clear that the privilege extends to all property without which the diplomatic function cannot be fulfilled. Whether it extends to all the property in the ownership or possession of the agent may be doubted. There is authority for the contention that it does,³ and it may be that the grant of immunity to all such property is justified—so far as it goes beyond what is necessary to avoid impeding the agent—by international comity. It is submitted that the test applied in *Novello v. Toogood*,⁴ that is, the necessity of the goods to, at most, the convenience of the envoy, is the true one. However, after this has been said, a number of questions remain to be answered. Does, for instance, the immunity extend to goods not presently in the possession of the envoy (or a member of his family or of his suite)? A court which had to decide a claim of immunity for property owned by an ambassador and in the hands of a bailee to be worked on,⁵ as a motor-car in a garage, or for safe custody, or in pawn, or by way of loan, would probably treat the matter as *res integra*. There is little or no authority on the question, and the court would be thrown back on first principles and especially that of *coactio*. It might well be driven to inquire⁶ whether or not the depriving the bailee of possession of the goods would cause inconvenience to the ambassador in the carrying out of his

¹ Professor Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', in this *Year Book*, 28 (1951), p. 235.

² 'Diplomatic immunity should not permit any individual who is involved in a civil dispute with another member of the community to be in an advantageous position in that dispute so that he can avoid either discharging obligations which he has contracted or making reparation for torts which he has committed.' *Inter-Departmental Report on Diplomatic Immunity* (1951), Cmd. 8460.

³ See *supra*, p. 119.

⁴ See *supra*, pp. 121-2.

⁵ In *The Amazone*, [1940] P. 40; *Annual Digest*, 1938-40, Case No. 162, a yacht, the private property of a diplomat, was laid up at Southampton in the hands of Messrs. Thornycrofts, the shipbuilders, who took their instructions from him. The Court held that he had possession of the yacht.

⁶ Much as it did in *Novello v. Toogood*: *supra*, pp. 121-2.

proper functions. Only if that were proved to be so should the court hold the goods to be immune from seizure, from distress, from the exercise of a lien, or as the case might be.

With regard to intangible property belonging to a diplomatic agent, it has to be remembered that the dividends, interests, or royalties arising therefrom may constitute a part—it might be embarrassing to inquire how considerable a part—of his income. To restrict his enjoyment of such income may seriously incommode him; it may prevent him from keeping up the state appropriate to his office; and may easily amount to such hindrance as to infringe the rules of international law. It would therefore appear that intangible property of an envoy must be regarded as covered by diplomatic immunity.

The immunity of immovable property owned and occupied by an envoy derives from the personal immunity of the ambassador, based on the rule *ne impediatur legato*. This would clearly apply to the premises where the envoy lives while engaged on his diplomatic business; the immunity probably extends as a matter of comity to a house used for recreational purposes, such as a shooting lodge, a country cottage, or a sea-side bungalow. Suppose, however, that a member of the staff of a legation takes a lease of a sea-side bungalow for, say, three years, and lets it for a short period when he does not himself require to live in it, to a person who is not entitled to diplomatic immunity.¹ Suppose again that he falls in arrear with his rent. It would seem difficult to justify a rule that forbade his landlord to distrain on the goods of the under-tenant and, after service of the prescribed notice under the Law of Distress Amendment Act, 1908, collect from the under-tenant the rent due. The proper rule, it is submitted, is that when the private property of a diplomatic agent is in question, there is an onus on him to show that it is entitled to an immunity the violation of which will cause him at least some inconvenience in the carrying out of his diplomatic functions.

The immunity of immovable property used as the embassy or legation, whether or not it is also the residence of the envoy, is, on the other hand, absolute. It comprises the immunity of the property devoted to public uses of the foreign sovereign whom the envoy represents. The immunity, however, amounts to no more than that. It does not constitute the embassy or legation 'foreign soil' for any juridical purpose, either for the legality or validity of transactions or other 'acts in the law' which take place there, or so as to oust the jurisdiction of the receiving State in regard to a crime committed there.² That is so whether the immunity of diplomatic premises is

¹ For a case on a sub-letting to a person entitled to diplomatic immunity see *Parker v. Boggon*, [1947] 1 K.B. 346, 63 T.L.R. 4, [1947] All E.R. 46.

² Otherwise, as a *reductio ad absurdum*, the removal of the criminal might call for extradition proceedings as well as the consent of the head of legation.

based on the fiction of extritoriality or on the functional concept of inviolability.

With regard to the question whether diplomatic property is entitled under international law to immunity from taxation, it has been seen that the authorities are virtually unanimous in answering this question in the negative, although by custom, courtesy, legislation, or treaty, premises owned or occupied by diplomatic persons are frequently exempt from taxation. It is quite irrelevant that a public charge levied or assessed on diplomatic premises cannot be enforced by execution, judicial sale, and the like. Such process will always be possible if and when the premises cease to be within the privilege and pass into private hands. Until then, it is true, taxes cannot be levied on the premises, but they can be assessed. Rates, notwithstanding the *Rockcliffe Park* case,¹ are on a similar footing. There seems to be no reason why diplomatic agents should not pay their way, paying for services rendered by local authorities in respect of diplomatic premises as they would pay for repairs done to them by private contractors. The fact that in neither case could payment be enforced by legal process is equally irrelevant.

¹ See *supra*, p. 145.

THE CONSTITUTION OF AN ARBITRAL TRIBUNAL

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I

A succession of cases before the International Court of Justice—the *Anglo-Iranian Oil Company* case between the United Kingdom and Iran,¹ the Advisory Opinion concerning *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*,² and the *Ambatielos* case between the United Kingdom and Greece³—have drawn attention to two major problems connected with the present state of international law in regard to arbitration. The first of these problems is that, if two or more parties have mutually entered into an undertaking to submit certain classes of disputes to arbitration and if, subsequently, a difference having arisen, one party contends either that there is no dispute at all or that the dispute is not covered by the undertaking to arbitrate, then the other party may have—indeed usually has—no means of obtaining a binding determination of these preliminary questions. The second problem is that the original undertaking to arbitrate may be frustrated by the refusal of one of the parties to co-operate in establishing the arbitral tribunal, either on the ground that there is no dispute—or at any rate no ‘arbitrable’ dispute—or on some other ground. For the purposes of this article these two problems may be regarded for the most part as being merged into one because, whether the refusal to co-operate in constituting the arbitral tribunal is based on the ground that there is no ‘arbitrable’ dispute—and this is naturally the ground usually cited as a pretext—or on some entirely different ground, the result is the same: no arbitral tribunal is constituted, no arbitration takes place, and therefore the original undertaking to arbitrate is rendered abortive. It is not, of course, suggested that these are the only problems connected with the law of arbitration, or that all is straightforward once the tribunal has been constituted. Nevertheless, it is submitted that the constitution of the tribunal is, on the whole, the *fundamental* problem of arbitration, because without a tribunal there can be no arbitration and the failure of this particular method of settling international disputes is a *total* failure. Once, however, an arbitral tribunal is established, and given the traditional doctrine, recently affirmed by the International Court of Justice, that ‘an international tribunal has the right to decide as to its own jurisdiction’,⁴ then the fate of the

¹ *I.C.J. Reports*, 1951, p. 89, and *ibid.*, 1952, p. 93.

² *Ibid.*, 1950, pp. 65 and 221.

³ *Ibid.*, 1952, p. 28, and *ibid.*, 1953, p. 10.

⁴ See the *Nottebohm* case: *I.C.J. Reports*, 1953, p. 111, at p. 119.

arbitral process is no longer entirely at the whim of the parties: if one party fails to co-operate, the other is no longer *totally* without a remedy.

The first case, that of *Anglo-Iranian*, arose as the result of the passing by the Iranian Parliament in April 1951 of an oil nationalization law, the effect of which was to terminate the Concession Agreement concluded on 29 April 1933—and which came into force on 29 May 1933—between the Imperial Government of Persia and the Anglo-Persian Oil Company,¹ a company incorporated in England. That law was enacted despite the fact that Article 21 of the Concession Agreement stated that 'This Concession shall not be annulled by the Government and the terms therein contained shall not be altered either by general or special legislation in the future, or by administrative measures or any other acts whatever of the executive authorities', and that Article 26 provided that the Concession would endure until 31 December 1993. The Agreement also contained an arbitration clause (Article 22) which stated that 'Any differences between the parties (i.e. the Company and the Persian Government) of any nature whatever . . . shall be settled by arbitration', and proceeded to prescribe elaborate rules concerning the constitution of the arbitral tribunal. Each of the parties was to appoint an arbitrator and the two arbitrators so appointed were to choose an umpire. If the two arbitrators failed to agree on the choice of an umpire, the latter was to be chosen by the President of the Permanent Court of International Justice. If, further, one of the parties failed to appoint an arbitrator within sixty days of having received notification of the request for arbitration, the other party had the right to request the President of the Permanent Court of International Justice to nominate a sole arbitrator, who would have power to settle the difference himself. In either case, the functions of the President of the Court were to be carried out by the Vice-President should the President be a national of the United Kingdom or Persia or otherwise closely connected with one of the parties. On 8 May 1951 the Company addressed a letter to the Iranian Prime Minister proposing arbitration under Article 22 and stating that the Company had appointed an arbitrator.² Two weeks later the Iranian Government replied to this letter refusing arbitration,³ whereupon, on 25 May, the Company wrote to the President of the Court (M. Basdevant) requesting him to nominate an arbitrator. The Company admitted that the period of sixty days, required under Article 22, had not yet elapsed, but contended that, since the Iranian Government had already categorically refused arbitration, they were entitled to proceed with the request for the nomination of an

¹ Before 1935 Iran was known as Persia and the Anglo-Iranian Oil Company as the Anglo-Persian Oil Company.

² For the text of this letter see *I.C.J. Pleadings, Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)* (hereinafter referred to as *Pleadings (A.I.O.C.)*), at p. 38.

³ *Ibid.*, p. 40.

arbitrator.¹ On 1 August the Company wrote again to the President drawing attention to the fact that the period of sixty days had now elapsed.² Meanwhile, however, the United Kingdom Government had itself started proceedings before the Court against the Iranian Government by means of an Application dated 26 May,³ of which the principal demand was that the Court should declare that the Iranian Government were under a duty to submit the dispute between themselves and the Company to arbitration under Article 22 of the Concession Agreement, and to accept and carry out any award issued as a result of such arbitration. Referring to this Application in his reply to the Company dated 28 May, M. Basdevant stated that: 'Without prejudice to any action that the Court may take regarding the petition submitted by the Government of the United Kingdom and regarding any objections that the Imperial Government of Iran might raise against it, I should draw your attention to the fact that each of these requests has certain points in common and that, consequently, I am unable to deal at present with that which you have submitted to me.'⁴ Finally, after the Court had ruled on 22 July 1952 that it was itself without jurisdiction to determine the case submitted by the United Kingdom Government,⁵ the Vice-President (M. Guerrero), acting in place of the new President (Sir Arnold McNair), who was presumably barred from acting because he was a United Kingdom national, wrote to the Company on 11 October 1952 stating that he did not consider himself entitled to proceed to the appointment of an arbitrator in their dispute with the Iranian Government.⁶

Thus the machinery provided under Article 22 failed, and it is of general importance to realize why this was so, because the reasons for the failure were not wholly connected with the fact that, of the parties to the Concession Agreement, one was not a State but only a company incorporated under English law. The underlying idea of Article 22—that of appointment of a sole arbitrator by a third party, if other means of establishing a tribunal failed—was essentially sound. It might well have succeeded but for the accident—which the draftsmen of 1933 could not have been expected to foresee—that in 1945 there was substituted for the old Permanent Court of International Justice the new International Court of Justice. Nevertheless, the failure to provide for this unexpected contingency was not the only defect of the procedure of Article 22. The very choice of the President of the Court as the outside appointing agency was, as events were to prove, unfortunate, and this is a matter of some moment because the President has been invited to assume, and has assumed, the task of appointing arbitrators in a number of other instances.⁷

¹ *Pleadings (A.I.O.C.)*, p. 387.

² *Ibid.*, p. 8.

³ *I.C.J. Reports*, 1952, p. 93.

⁴ *Ibid.*

⁵ *Ibid.*, p. 392.

⁶ *Ibid.*, p. 391.

⁷ *I.C.J. Yearbook*, 1952-1953, p. 45.

In theory there could be no more appropriate choice for this task—which may sometimes be a delicate one—than the President of the Court, who may be relied upon to be an international official of the highest integrity and impartiality. But it must be remembered that no express authority is given to the President in the Court's Statute for the exercise of functions of this character and that, even within the field of his prescribed functions, he is still not so much an independent person as the servant of the Court. In no sense is the President comparable to the chief justice, or indeed any justice, of a municipal judicial system. If Professor Kelsen's statement that 'the principle: what is not forbidden is permitted . . . does not apply to the competence of the organs of the [international] community',¹ were to be interpreted literally, it would be necessary to conclude that the appointment of arbitrators by the President is *ultra vires* and therefore not binding. In view, however, of the wide extent to which successive Presidents have, without any objection, assumed, and carried out, this task, such a conclusion must be rejected. The better view no doubt is that there is no objection to the President, or any other international official—for instance the Secretary-General of the United Nations²—assuming this function, provided that its exercise is consistent with the duties expressly imposed upon him in the constitution of his office. According to this view, an international official does nothing wrong if, with the consent of two separate States, he performs some special task on their behalf, provided that the performance of this task is in no way incompatible with the duties conferred upon him by the international community as a whole. But the acceptance of this principle in no way removes the difficulties connected with the choice of the President of the Court as the person charged with the duty of appointing arbitrators in certain cases. The President remains a judge, and the senior judge, of the Court, and a situation may easily arise in which the effect of an appointment of an arbitrator by the President may be to ~~prejudge~~ some issue which either is, or may come, before the Court. No doubt the same considerations apply to some extent to any person or body called upon to appoint arbitrators, but the mere risk of such a situation arising must tend to make the President of the Court exceptionally cautious, whereas the whole theory underlying the appointment of arbitrators by an outside agency is not merely that such appointments should be impartial but also that they should be certain. Little is gained by the procedure if, to the risk that the other party will not make an appointment, there is added the risk that the outside agency will also decline.

It is now time to return from these theoretical considerations to the facts of the *Anglo-Iranian* case. The reasons given by M. Guerrero for his inability to nominate an arbitrator were that the 1933 Concession Agreement

¹ *The Law of the United Nations* (1950), p. 685.

² See below, p. 161.

had conferred power to appoint upon the President or Vice-President of the Permanent Court of International Justice; that no request had been addressed to the International Court of Justice by the parties to the contract to undertake functions similar to those entrusted to the President or Vice-President of the Permanent Court; and that Article 37 of the Statute could not be applied since that provision related only to the settlement of cases of jurisdiction provided for in a treaty or convention between States.¹ If these were the reasons for not appointing an arbitrator, it may be asked why the Company were not informed at once, but only after an interval of eighteen months. The answer lies in the very proper fear of the previous President that a decision either to grant or to reject the Company's request for the appointment of an arbitrator would have prejudged a principal issue in the case between the two Governments. For the United Kingdom Government, in its Application, had intimated that it was going to argue that, having regard to the unusual circumstances of its conclusion,² the Concession Agreement between the Company and the Persian Government, in addition to being a contract under Persian law, also had the character of an international treaty between the Persian and United Kingdom Governments. If this argument had been upheld, it would have followed that Article 37 of the Court's Statute was applicable and then, not only might the President have been entitled to appoint an arbitrator, but also the Court would undoubtedly have had jurisdiction to determine the case between the two Governments.³

Since, however, Article 37 of the Statute was considered to be inapplicable, M. Guerrero took the view that it would not have been proper for him to appoint an arbitrator unless both parties had addressed a request to the International Court of Justice inviting its President to undertake the same functions which the President of the Permanent Court had been invited to undertake. In this connexion it may be observed that the terms of

¹ *I.C.J. Yearbook, 1952-1953*, p. 45. Article 37 of the Statute reads as follows: 'Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.'

² By these circumstances were meant the fact that the United Kingdom Government had accepted the conclusion of the Concession Agreement between the Persian Government and the Company as a settlement of its own dispute with the Persian Government, which was at the time on the agenda of the Council of the League of Nations.

³ The Court's eventual finding that it lacked jurisdiction depended upon the fact that the Persian declaration accepting the jurisdiction of the Court was limited to 'disputes . . . with regard to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Persia and subsequent to the ratification of this declaration. . . .' (i.e. subsequent to 19 September 1932). The Court held that the treaties and conventions, as well as the situations and facts, must be subsequent to 19 September 1932. If, however, the Concession Agreement had been held to be a 'treaty or convention' within the meaning of the declaration, there would have been no doubt that the Court possessed jurisdiction, since the Concession Agreement was concluded in 1933.

M. Guerrero's letter suggest that, in his opinion, the invitation should have come from 'the parties to the contract', by which were presumably meant the Iranian Government and the Company, rather than from the two Governments. In actual fact, however, the original notification to the President of the Permanent Court of the existence of the Concession Agreement had come not from the parties to that Agreement but from the Persian and United Kingdom Governments.¹ But it may be readily agreed with M. Guerrero that the request should have come from the Iranian Government and the Company, rather than from the Iranian and United Kingdom Governments. Indeed, in all cases in which the President is requested to assume the task of appointing arbitrators, whether it be by two Governments, a Government and a private person or corporation, or even by two private persons or corporations, there seems no reason why the request should not be addressed to him by the parties themselves rather than by Governments acting on behalf of the private interests concerned. There would appear to have been no necessity for the request to be addressed to the Court by the United Kingdom Government, rather than by the Company, in 1933. While it may be true that, under Article 34 of the Statute, 'Only States may be parties in cases before the Court', there is no reason at all why the right to request the President (or even the full Court)² to appoint arbitrators should be confined to States. To request the appointment of an arbitrator is not to be a party in a case before the Court. Distinct from the question whence the request should be addressed is the question to whom it should be addressed. Should the parties address the request to the President personally or to the Court officially? The answer to this question raises matters of substance as well as form, since it concerns the issue whether, in appointing arbitrators, the President acts in a purely personal capacity or ultimately under the control of the Court. The terms of

¹ The procedure followed was that, on 17 August 1933, identic letters to the Registrar of the Court (M. Hammarskjöld), notifying him of the existence of the Concession Agreement, and in particular of Article 22, were addressed by the Governments of the United Kingdom and of Persia. The two Governments explained that 'circumstances made it desirable that the formalities necessary for the entry into force of the Agreement should be accomplished with the minimum of delay; and, since it was understood that the Permanent Court was unlikely to meet again before the month of September, it appeared impracticable to obtain beforehand the formal concurrence of the Court in this provision' (i.e. Article 22). They concluded by trusting 'that no obstacle will be seen to the acceptance by the Court of the functions conferred by Article 22 of the Agreement upon its President or Vice-President' (*Pleadings (A.I.O.C.)*, pp. 270-1). The Registrar replied stating that the Court 'sees no obstacle to the acceptance by its President and Vice-President of the functions conferred upon them by Article 22 of the said Agreement' (*ibid.*, p. 272).

² While it is usual for all functions connected with the appointment of arbitrators to be conferred upon the President, Article 16 of the Treaty of 17 December 1939 between Colombia and Venezuela departed from this practice by providing that, if disagreement arose over the appointment of the third member of the tribunal, the Permanent Court of International Justice should be requested to make the appointment. Such a request, however, was to come from both parties. (*United Nations Systematic Survey of Treaties for the Settlement of International Disputes*, 1928-1948 (1948), p. 101.)

M. Guerrero's letter suggest that he thought 'the parties to the contract' should have addressed their request to the Court officially rather than to the President personally. The language used by the two Governments in 1933—i.e. their hope that 'no obstacle will be seen to *the acceptance by the Court* of the functions conferred by Article 22 of the Agreement upon its President or Vice-President'—suggests that they also thought that, as concerns his basic right to possess and exercise the power of appointment, even if not as concerns the actual manner of the exercise of the power, the President was under the control of the Court. It may not be always possible to keep the distinction clear between the right to exercise a power and the manner of its exercise. Moreover, even if, strictly speaking, the President is not responsible to the Court for the manner in which he exercises the power, it is reasonable to assume that no President would be likely to exercise it in a manner contrary to the wishes of the majority of the Court. In these circumstances the question may well be asked if the President of the International Court of Justice is as wise a choice for the task of appointing arbitrators as might appear at first sight—the more so if the reason for choosing the President is belief, not merely in his impartiality, but also in his independence. It is not intended, however, to answer this question here, but rather simply to draw attention to the fact that those parties who request the President to assume this delicate function should be fully aware of all the problems involved, and to suggest that the matter requires careful study. The need for further study of the matter seems indeed to be the principal lesson to be derived from the *Anglo-Iranian* case.

In the second case, that of the *Peace Treaties*, the facts were that in the Peace Treaties of 1947 the Governments of Bulgaria, Hungary, and Roumania undertook to take all measures necessary to secure to all persons under their jurisdiction, without distinction as to race, sex, language, or religion, the enjoyment of human rights and the fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion, and of public meeting. It was also provided that disputes concerning the interpretation or execution of the Treaties, which were not settled by direct diplomatic negotiations, should be referred to the three Heads of Mission (i.e. the diplomatic representatives of the United Kingdom, the United States of America, and the Soviet Union) in Sofia, Budapest, and Bucharest respectively. Disputes not resolved by the Heads of Mission within a period of two months were, if not settled otherwise, to be 'referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country'. Finally, it was provided that, 'Should the two parties fail to agree within a period of one month upon the appointment of the third member,

the Secretary-General of the United Nations may be requested by either party to make the appointment.'

Doubts having occurred as to whether the human rights provisions of the Treaties were being carried out, the Governments of the United Kingdom and the United States raised the matter with the three Governments concerned and, receiving no satisfaction, referred it to the Heads of Mission, also without success. They thereupon invited the three Governments to join in appointing Commissions, pursuant to the provisions of the Peace Treaties, but the invitation was refused. Subsequently, the General Assembly decided to submit the following questions to the International Court of Justice for an Advisory Opinion: (i) whether the diplomatic exchanges between Bulgaria, Hungary, and Roumania, on the one hand, and certain Allied and Associated Powers signatories to the Treaties of Peace, on the other hand, concerning the implementation of the human rights provisions in the Treaties disclosed 'disputes subject to the provisions for the settlement of disputes' contained in the disputes articles of the Treaties; (ii) whether, in the event of an affirmative answer to (i), the three Governments were 'obligated to carry out the provisions' of the disputes articles, 'including the provisions for the appointment of their representatives to the Treaty Commissions'; (iii) whether, in the event of one or other of the three Governments failing to appoint a representative to a Treaty Commission, the Secretary-General of the United Nations was 'authorized to appoint the third member of the Commission upon the request of the other party to a dispute'; and (iv) whether, in the event of an affirmative answer to (iii), a Treaty Commission composed of a representative of one party and a third member appointed by the Secretary-General of the United Nations would 'constitute a Commission, within the meaning of the relevant Treaty articles, competent to make a definitive and binding decision in settlement of a dispute'.

The Court decided the first two questions in the affirmative, and the third in the negative, with the result that the fourth question was not answered at all. The aspect of the Court's opinion which has attracted most attention—and a certain amount of adverse comment—is its negative answer to the third question. It must not, however, be forgotten—since it is of the greatest significance—that the Court answered the first two questions in the affirmative. Dealing with the first question, the Court stated categorically: 'Whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence.'¹ It is therefore no longer possible to argue that the question whether there exists a dispute, in particular an 'arbitrable' dispute, is one which each party to an undertaking to arbitrate may decide

¹ *I.C.J. Reports, 1950, p. 74.*

for itself.¹ The Court seems to have regarded this argument—though regrettably it is often put forward—as so patently bad as scarcely to merit attention. It may, however, be observed that the very ground usually put forward as a justification of the argument, namely, the sovereignty of States, is in fact the principal ground of its hollowness. For what would be more destructive of the fundamental principle of the sovereignty of States than to hold that, if two States are parties to a treaty, each is bound by the other's interpretation of that treaty? *Par in parem non habet imperium*. It follows inevitably from the sovereignty of States, as expressed in their equality, that questions of treaty interpretation which arise between them—and the question of 'arbitrability' of disputes is just such a question—must be susceptible of objective determination. It makes no difference that the States concerned may have failed to establish any machinery whereby such an objective determination may be secured.

Scarcely less important was the Court's statement *à propos* the second question in the following terms:

'In view of the fact that the Treaties provide that any dispute shall be referred to a Commission 'at the request of either party' it follows that either party is obligated, at the request of the other party, to co-operate in constituting the Commission, in particular by appointing its representative.'²

Elsewhere in the case the Court stated that the three Governments were 'under an obligation to appoint their representatives to the Treaty Commissions, and it is clear that refusal to fulfil a treaty obligation involves international responsibility'.³ The international responsibility which arises from a refusal to co-operate in securing an objective determination of the question whether the dispute is arbitrable or not is in no way diminished by the fact that no means may have been prescribed whereby this responsibility can be enforced.⁴

On the third question the Court held that the breaches of treaty obligation which had undoubtedly been committed could not be remedied, in this particular case, 'by creating a Commission which is not the kind of Commission contemplated by the Treaties'.⁵ Whereas Judges Read and Azevedo, who dissented, favoured a liberal interpretation of the disputes articles in the Treaties which would permit the Secretary-General to appoint an arbitrator regardless of the default of the three Governments, the Court observed that 'The Secretary-General's power to appoint a third member is derived solely from the agreement of the parties as expressed in

¹ The fact that there may be no tribunal with jurisdiction to determine the question objectively, is, so far as the merits of the argument are concerned, immaterial.

² *I.C.J. Reports*, 1950, p. 77.

³ *Ibid.*, p. 228.

⁴ As the Court said: 'The failure of machinery for settling disputes by reason of the practical impossibility of creating the Commission provided for in the Treaties is one thing; international responsibility is another' (*ibid.*, p. 229).

⁵ *Ibid.*

the disputes clause of the Treaties; by its very nature such a clause must be strictly construed and can be applied only in the case expressly provided for therein.¹ The Court did not, however, appear to have any doubt that the Secretary-General was entitled to exercise the function of appointing arbitrators, even though such a function is not expressly conferred upon him under the Charter.

In the third case, that of *Ambatielos*, it was provided in a Protocol annexed to the Treaty of Commerce and Navigation between Great Britain and Greece dated 10 November 1886² that any controversies which might arise respecting the interpretation or the execution of the Treaty, or the consequences of any violation thereof, should be submitted, 'when the means of settling them directly by amicable agreement are exhausted, to the decision of Commissions of Arbitration' and that 'the members of such Commissions shall be selected by the two Governments by common consent, failing which each of the Parties shall nominate an arbitrator, or an equal number of arbitrators, and the arbitrators thus appointed shall select an umpire'. The Treaty of 1886 was later replaced by a Treaty of 16 July 1926,³ which contained an article providing for the compulsory reference of 'any dispute that may arise . . . as to the proper interpretation or application of any of the provisions of the present Treaty' to the Permanent Court of International Justice, unless the parties should agree on any other tribunal. Signed simultaneously with the Treaty of 1926 was a Declaration providing that:

'It is well understood that the Treaty of Commerce and Navigation between Great Britain and Greece of to-day's date does not prejudice claims on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886, and that any differences which may arise between our two Governments as to the validity of such claims shall, at the request of either Government, be referred to arbitration in accordance with the provisions of the Protocol of November 10th, 1886, annexed to said Treaty.'

A claim on behalf of Mr. Ambatielos, a Greek national, having emerged as a result of certain events which occurred in 1919-23, the Greek Government—after a considerable delay, some of which of course was spent in abortive negotiations—proposed to the United Kingdom Government in 1940 that arbitrators should be appointed as provided for in the 1886 Protocol. This proposal was declined, but on 9 April 1951 the Greek Government, invoking the disputes article in the 1926 Treaty, asked the Court to declare: (i) 'that the arbitral procedure referred to in the Final Protocol of the Treaty of 1886 must receive application in the present

¹ *I.C.J. Reports*, 1950, p. 227.

² *British and Foreign State Papers* (hereinafter referred to as *B.F.S.P.*), vol. 77, p. 100.

³ *Handbook of Commercial Treaties* (1931), p. 325.

case'; and (ii) 'that the Commission of Arbitration provided for in the said Protocol shall be constituted within a reasonable period, to be fixed by the Court'. Later the Greek Government added a further submission, inviting the Court itself to determine the case on the ground that the Court was entitled to deal with all questions affecting the interpretation of the 1926 Treaty and that the provisions of the 1886 Treaty, on which the claim was said to be based, were 'similar' to those of the 1926 Treaty. The Court held that it had no jurisdiction to determine the claim itself, but that, since the 1926 Declaration could be said to be part of, and therefore a 'provision' of, the 1926 Treaty, it had jurisdiction to decide whether the United Kingdom was 'under an obligation to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity of the *Ambatielos* claim, in so far as this claim is based on the Treaty of 1886'.¹ Later, the Court held that the claim was 'based on the Treaty of 1886' within the meaning of the 1926 Declaration so that the United Kingdom was obliged to submit to arbitration the difference as to its validity under the 1886 Treaty.² The consequence of these proceedings was that an 'objective determination' was secured of the question whether the dispute was arbitrable and, the answer being in the affirmative, the United Kingdom was declared to be under a duty to co-operate in establishing the arbitral machinery provided for in the 1886 Protocol. The significance of the *Ambatielos* case, therefore, lies chiefly in the fact that, especially by contrast with the other cases, it illustrates how an undertaking to arbitrate may be effectively enforced under international law. Enforcement of the obligation to arbitrate contained in the 1886 Protocol was made possible—and only made possible—through the links between that Protocol and the compulsory jurisdiction of the Court provided in turn by the 1926 Declaration and the disputes article in the 1926 Treaty.³ Ultimately, therefore, the problem of enforcement of the undertaking to arbitrate is the same as that of extending the field of the compulsory jurisdiction of the Court. It may also be observed that, provided that it is granted the necessary jurisdiction, the International Court of Justice is a specially adequate instrument of enforcement. This is because the Court is not restricted to awarding damages for the breach of the obligation to arbitrate, but is, as the *Ambatielos* case shows, in a position to decree what amounts to specific performance.⁴ For, although, under the Statute, the Court has no express power to order specific performance, the same result is achieved from a combination of the Court's power to deliver

¹ *I.C.J. Reports*, 1952, p. 46.

² *Ibid.*, 1953, p. 23.

³ Although this result followed from the conclusion of the 1926 Treaty and Declaration—on the assumption that the latter was a 'provision' of the former—it may be doubted if at the time the parties either intended this result or even realized that it had occurred.

⁴ Having regard to the uncertainty as to the eventual outcome of the arbitration proceedings, damages for the breach of an undertaking to arbitrate might well be no more than nominal.

declaratory judgments,¹ which bind the parties in respect of a particular case, and the duty of the parties to comply with such judgments.²

The conclusions to be drawn from the three cases may now be summarized as follows:

- (1) If two parties have entered into an undertaking to refer certain classes of disputes to arbitration, and the undertaking contains express provisions as to the constitution of the arbitral tribunal, refusal by one of the parties to co-operate in constituting a tribunal when requested to do so by the other, whether on the ground that there is no dispute at all, or that there is no 'arbitrable' dispute, or on any other ground, may be a breach of the undertaking to arbitrate.
- (2) Refusal to co-operate in constituting a tribunal in the above circumstances is a breach of the undertaking to arbitrate if, *objectively*, an arbitrable dispute exists: it is not a breach of the undertaking to arbitrate if, *objectively*, no arbitrable dispute exists. A breach of the undertaking to arbitrate, however, involves international responsibility irrespective of the question whether any means exist or do not exist whereby the breach can be remedied.
- (3) If the undertaking to arbitrate contained express provisions for the constitution of the arbitral tribunal by an outside agency under certain conditions, then such outside agency is entitled to take the necessary steps to constitute the tribunal, provided only that all the required conditions have been fulfilled.
- (4) If, however, the undertaking to arbitrate contained no express provisions for the constitution of the arbitral tribunal by an outside agency—or if it contained provisions capable of being effective only under certain conditions and those conditions have not been fulfilled—then no tribunal can be constituted, unless there exist some means, independent of the undertaking to arbitrate, of compelling the defaulting party to carry out his obligations. One such means—assuming that there is a basis for the Court's jurisdiction—is a Judgment of the International Court of Justice declaring that the defaulting party is obliged to co-operate in constituting the tribunal provided for in the original undertaking to arbitrate.

One question—more important, perhaps, from the point of view of theory than of practice—remains to be considered. This question relates to the position which arises if the original undertaking to arbitrate contained no

¹ See Judge Hudson's Separate Opinion in the case of *The Diversion of Water from the Meuse* (P.C.I.J., Series A/B, No. 70, p. 79).

² See Article 94 of the Charter of the United Nations; the resolution adopted by the General Assembly in the case of Switzerland on 11 December 1946 and followed in respect of other countries admitted as parties to the Statute of the Court (I.C.J. Yearbook, 1947-1948, pp. 30-31); and the resolution adopted by the Security Council under Article 35 (2) of the Statute on 15 October 1946 (*ibid.*, pp. 33-34).

provisions at all concerning the constitution of an arbitral tribunal—not even by the parties themselves—but consisted simply of a promise that certain classes of disputes would be referred to or settled by arbitration. In such circumstances, can it be implied that, if one party requests arbitration, the other party is under a duty to appoint an arbitrator (or any particular number of arbitrators) or to take any specific steps towards the constitution of an arbitral tribunal? It is submitted that this question could be answered in the affirmative only if it could be proved that there is a rule of customary law, or an established rule of interpretation, that a pure undertaking to arbitrate necessarily implies an obligation to take some specific step in the matter of constituting a tribunal. It is believed that the existence of no such rule can be proved. A survey of international arbitration shows an immense variety in the types of tribunal which States have set up for particular purposes, and in the manner of setting them up. Although tribunals of three members (one member nominated by each party and one ‘neutral’ member) are the most common, there is no uniformity concerning the appointment of the third member. Sometimes he is chosen by the parties themselves, sometimes by the other two arbitrators, sometimes by an outside agency, sometimes by lot. Sometimes the third member is a full member of the tribunal, and usually its president; on other occasions he is a mere ‘umpire’, called in only when the two arbitrators appointed by the parties fail to agree.¹ Many important cases have been referred to a sole arbitrator, or to five arbitrators, or to seven, or even to an even number of arbitrators such as six. There is an equally great variety in the manner of appointment. Sometimes the tribunal is nominated collectively by agreement between the parties; sometimes it is built up by a succession of appointments, first, by the parties themselves, second, by the arbitrators initially chosen, and possibly, third, by an outside agency; sometimes the entire tribunal is appointed by an outside agency.² The practice of States

¹ See Feller, *The Mexican Claims Commissions, 1923-1934* (1935), p. 40. While tribunals of three members are usual in claims cases, they are not of course confined to those cases. For example, the *Grisbadarna* case (Scott, *The Hague Court Reports* (1916) (hereinafter referred to as Scott), p. 121), which involved a maritime boundary question, was referred to three arbitrators, as was the *Muscat Dhows* case (ibid., p. 93). In the *Venezuelan Preferential* case (ibid., p. 55), involving a number of States, the three ‘neutral’ arbitrators were all appointed by the Czar of Russia, two being Russian nationals and the other an Austrian.

² A few examples only will suffice. Among the cases referred to a single arbitrator were those of the *Tinoco Concessions* (*Reports of International Arbitral Awards* (hereinafter referred to as *R.I.A.A.*), p. 369); *Ottoman Public Debt* (ibid., p. 529); *Tacna-Arica* (ibid., p. 923); and *Clipperton Island* (ibid., p. 1105). Five arbitrators were appointed in the *Alabama* case (de Lapradelle et Politis, *Recueil des arbitrages internationaux* (1923), vol. ii, p. 777), and in the cases of the *Pious Fund* (Scott, p. 1), *Casablanca Deserters* (ibid., p. 110), *North Atlantic Coast Fisheries* (ibid., p. 141), *Savarkar* (ibid., p. 297), and *Russian Indemnity* (ibid., p. 297). The *Behring Sea* case (*B.F.S.P.*, vol. 85, p. 1158) was decided by seven arbitrators; and the *Chaco* (*R.I.A.A.*, p. 1817) and *Alaska Boundary* (*B.F.S.P.*, vol. 98, p. 152) cases by six. Some unusual cases were the boundary dispute between Colombia and Venezuela decided by the Swiss Federal Council (*R.I.A.A.*, p. 223); the *Naulilaa* and other cases between Germany and Portugal decided by

confirms their understanding as expressed in Article 15 of Hague Convention No. I for the Pacific Settlement of International Disputes, of 1899, that 'International arbitration has for its object the settlement of differences between States *by judges of their own choice*, and on the basis of respect for law'.¹ Judicial settlement, no less than arbitration, has for its object the settlement of differences between States 'on the basis of respect for law'. But the right of the parties to choose their own judges has always been, and remains to this day, the distinguishing feature of international arbitration. The practice of selection of the arbitrators by the parties themselves is indeed so firmly established in international law that it would be a radical innovation to imply any departure from it in any undertaking to arbitrate, except in the face of the plainest evidence.² This does not mean, however, that an undertaking to arbitrate which contains no provisions at all as to the constitution of the arbitral tribunal remains entirely without effect. It is a treaty obligation—a *pactum de contrahendo*—and as such it must be carried out in good faith. Applied to a *pactum de contrahendo*, the principle of good faith requires the conduct of negotiations towards the desired object. The negotiations themselves must be conducted in good faith, but, as the Permanent Court of International Justice once said, 'an obligation to negotiate does not imply an obligation to reach an agreement'.³ Moreover, even if the negotiations break down, bad faith 'should not be lightly imputed'.⁴ The failure to agree upon the composition of the tribunal may derive not from any desire to evade the obligation to arbitrate, but from a genuine disagreement between the parties as to the type of tribunal which would be suitable. Nor should bad faith necessarily be imputed even if one party is unwilling to permit the tribunal to be constituted by an outside agency, since, as has been emphasized above, the obligation to arbitrate, when entered into by the parties, involved no more than a readiness to submit disputes for settlement on the basis of respect for law 'by judges of their own choice', i.e. chosen by mutual agreement of the parties and not by an outside agency, however impartial.

three Swiss arbitrators (*ibid.*, p. 1011); and the *Sopron-Kőszeg Railway* case between the 'Compagnie du chemin de fer vicinal de Sopron-Kőszeg', on the one hand, and Austria and Hungary on the other hand, decided by three 'neutral' arbitrators appointed by the Council of the League of Nations (*ibid.*, p. 961).

¹ While Article 24 of the 1899 Hague Convention provided machinery (greatly strengthened in Article 45 of the 1907 Convention) for outside intervention in the matter of choosing the umpire, it contained no provision to govern the situation if one of the parties failed to appoint the two arbitrators required under the Article. The 1907 Convention was similarly lacking. Article 23 of the General Act of 1928 (as of the Revised General Act of 1949) is ambiguous, but it probably does not justify the constitution of the tribunal by the President of the Court in the event of the failure of one of the parties to nominate an arbitrator.

² A clear departure from the traditional practice is, however, made in Article 45 of the Pact of Bogotá of 30 April 1948 (*United Nations Treaty Series*, vol. 30, p. 100).

³ *Case concerning Railway Traffic between Lithuania and Poland* (P.C.I.J., Series A/B, No. 42, p. 116).

⁴ *Per* President Calvin Coolidge in the *Tacna-Arica* case (*loc. cit.*).

II

Some proposals of the International Law Commission and a debate in the Sixth Committee

At its fourth session, held in 1952, the International Law Commission, basing itself on earlier reports by one of its members, Professor Georges Scelle, and after prolonged discussions, adopted a 'Draft on Arbitral Procedure'¹ consisting of thirty-two articles, of which Articles 2 and 3 are relevant to the matter now under discussion. Article 2 enunciated the following important principle:

'If, prior to the constitution of an arbitral tribunal, the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether an existing dispute is within the scope of the obligation to have recourse to arbitration, the question may, in the absence of agreement between the parties upon another procedure, be brought before the International Court of Justice on an application by either party. The judgment rendered by the Court shall be final.'

Article 3 was concerned with the actual constitution of the tribunal and contained provisions whereby a tribunal could be set up at the instance of one party only, if both parties failed to establish one by agreement within three months from the date of the request for arbitration or of the decision of the Court that an arbitrable dispute existed. It was provided that the parties should, in each event, request a third State to make the necessary appointments; if they failed to agree upon the selection of the third State within three months, they should each designate a State and the necessary appointments would be made by the two States thus designated; and, if that method too failed, the appointments would be made by the President of the International Court of Justice, or by the Vice-President (or the oldest Judge), should the President (or Vice-President) be a national of one of the parties or be otherwise prevented from acting. While appreciating that it was required by its Statute to bear in mind the distinction between 'codification' and 'progressive development' of the law, the Commission stated that 'the draft as a whole could not be based on the exclusive adoption of either method'. It was admitted that on certain matters innovations had been made, the criterion apparently being 'the lessons of experience and the requirements of international justice'. It was thought particularly necessary 'to provide for recourse to a court which could give a binding decision on the "arbitrability" of the dispute' and also 'to bring about the constitution of the arbitral tribunal'. The Commission considered that 'the International Court of Justice is the most suitable agency for safeguarding the effectiveness of the undertaking to arbitrate and the independence and the authority

¹ *Report of the International Law Commission, covering the work of its fourth session, June 4-August 8, 1952: General Assembly, Official Records, Seventh Session, Supplement No. 9 (A/2163).*

of the arbitral procedure in general'. After stating that it was necessary to balance the need for flexibility in arbitral procedure, so that the parties should be able to adapt it to the requirements of any particular dispute, against its character as a judicial process, which required some 'essentially mandatory' features, the Commission posed its real dilemma in the following terms:

"Two currents of opinion were represented in the Commission. The first followed the conception of arbitration according to which the agreement of the parties is the essential condition not only of the original obligation to have recourse to arbitration, but also of the continuation and effectiveness of arbitration proceedings at every stage. The second conception, which prevailed in the draft as adopted and which may be described as judicial arbitration, was based on the necessity of provision being made for safeguarding the efficacy of the obligation to arbitrate in all cases in which, after the conclusion of the arbitration agreement, the attitude of the parties threatens to render nugatory the original undertaking."¹

The essential features of the conception of 'judicial arbitration' which the Commission thus adopted (though by no means unanimously) are those contained in Articles 2 and 3 of the draft, which have been summarized above. The next stage was to await the comments of the Governments. These were disappointing, in that only eleven Governments commented, and of these only six really addressed themselves to the principle of 'judicial arbitration'. Norway, the United Kingdom, and Uruguay expressed themselves as being in favour; while Belgium, India, and the Netherlands were opposed. The United Kingdom Government stated that they 'strongly support the line taken by the Commission in basing itself on the second of the two conceptions . . . that is to say, that judicial arbitration is based on the necessity of provision being made for safeguarding the efficacy of the obligation to submit the case to arbitration in all cases in which it may happen that, after the conclusion of the arbitration agreement, the attitude of the parties threatens to render nugatory the original undertaking'.

On the other side, the comments of the Netherlands Government are the most interesting. That Government began by observing that arbitration is among the oldest means of settling international disputes peacefully and, 'in order to maintain its place beside more recent judicial means, arbitration should retain definite characteristics of its own by which to distinguish itself from judicial settlement'. One such characteristic, according to the Netherlands Government, was 'the somewhat mediatory quality of the award'. This, it is submitted, is an inaccurate observation, in that an arbitral award, no less than a judicial decision, must be on 'the basis of respect for law'—although it is no doubt a fact that, when States submit a dispute to arbitration, they are more ready to grant the arbitrators power

¹ *Report of the International Law Commission, &c. (A/2163), p. 3.*

to take account of special features, or to decide *ex aequo et bono*, than they are when they submit a dispute to judicial settlement. This readiness on the part of States, however, derives not so much from any fundamental difference between an arbitral award and a judicial decision as from the fact that, whereas individual States to a large extent control the composition of an arbitral tribunal, they have no direct control over the composition of a court, such as the International Court of Justice. Moreover, States submitting a dispute to arbitration are entitled to prescribe the precise degree to which (if at all) the tribunal shall be permitted to depart from the rules of general international law, whereas the International Court of Justice has no option but to decide either 'in accordance with international law' (paragraph 1 of Article 38 of the Statute) or '*ex aequo et bono*, if the parties agree thereto' (paragraph 2 of the same Article). To resume, however, the study of the comments of the Netherlands Government, that Government stated: 'Another highly important characteristic difference between the two institutions [i.e. arbitration and judicial settlement] is to be found in the greater prerogatives of the parties allowed for in arbitration, in regard to both the composition of the tribunal as well as the course of the procedure. From this special characteristic of arbitration follows the undesired consequence that it is rather easy for an unwilling party to find an excuse for shirking its engagements.' Having thus baldly stated the problem, the Netherlands Government proceeded to observe that attempts to prevent the evasion of undertakings to arbitrate had been under consideration ever since 1899 and that, however praiseworthy might be the ambition of the International Law Commission (as of other bodies) to set up watertight rules barring such evasions, 'yet some doubt may arise whether in this way arbitration will not be divested of one of its specific characteristics and whether this may not entail the impossibility for arbitration to maintain itself beside international judicature [*sic*]. In other words; may not arbitration lose its attractiveness for the States.' The danger which the Netherlands Government feared was that States would 'feel inclined to reject the draft because in their view it might restrict too much the lenient rules of arbitral procedure'. This objection would lose weight, they said, if there were a corresponding increase of international compulsory jurisdiction, but of that there seemed little prospect. In the circumstances the best course might be to proceed with the Commission's draft, but to permit States either to adopt it with reservations or to except certain articles from ratification.

The Commission seems to have treated the paucity of the comments as a token of confidence in its work because the 'Draft Convention on Arbitral Procedure' adopted at its fifth session proceeds on the same basis as the earlier draft, i.e. it favours the conception of 'judicial arbitra-

tion'.¹ Indeed, that conception is strengthened in the new draft by the omission of the necessity for recourse, under Article 3, to a third State before recourse is had to the President of the International Court of Justice for the purpose of appointing arbitrators. According to the provisions of the revised draft, the President (or Vice-President) may appoint, if one of the parties has failed to make the necessary appointments within three months from the date of the request for the submission of the dispute to arbitration, or from the date of the decision of the International Court of Justice that an arbitrable dispute exists. The appointments are to be made in accordance with any provisions that may have been previously laid down in the undertaking to arbitrate—or in the *compromis*, if there is one—but the Article also states that 'in the absence of such provisions the composition of the tribunal shall be determined, after consultation with the parties, by the President of the International Court of Justice or the judge acting in his place'. Consultation, however, is not synonymous with consent, so the possibility exists under the draft that, not only may a party be ordered by the Court to submit to arbitration in respect of a dispute which it does not consider arbitrable, but also a tribunal may be constituted in the absence of any previous agreement between the parties as to the type of tribunal to which disputes should be submitted. The first recommendation would only confirm a situation which already exists in those cases where—as, for instance, in the *Ambatielos* case—the preliminary question of arbitrability is referable to the Court by unilateral application. But the second recommendation would—if the analysis at the end of the first section above be correct—constitute a significant innovation in international law. The Commission in this context again emphasized the difficulty of keeping apart the functions of 'codification' and 'progressive development'. Thus it was stated that:

'While with regard to what must be considered as the primary aspect of international arbitration the present draft codifies existing law, it proceeds, in a distinct sense, by way of developing international law with regard to certain procedural safeguards for securing the effectiveness, in accordance with the original common intention of the parties, of the undertaking to arbitrate. Without expressly departing from any established

¹ The new draft convention, as well as the comments of the Governments on the previous draft, are contained in *Report of the International Law Commission, covering the work of its fifth session, June 1–August 14, 1953*: General Assembly, *Official Records*, Eighth Session, Supplement No. 9 (A/2456). It may be observed here that the term 'arbitral procedure', used in connexion with the draft convention, is somewhat misleading. As the Commission explained, the Convention is not concerned with 'detailed rules of procedure on the lines of those embodied, for instance, in the Rules of the International Court of Justice', but with 'arbitral procedure in its wider sense, i.e., provisions for safeguarding the effectiveness of arbitration engagements accepted by the parties, as well as clauses relating to the constitution and powers of the tribunal, the general rules of evidence and procedure, and the award of the arbitrators'. With regard to the 'detailed rules of procedure', the Commission made the constructive suggestion that the Secretariat of the United Nations should make a collection of such rules which the parties could either use *in toto* or vary according to the circumstances of each arbitration.

rule, the Commission has gone in this respect outside the existing law by devising, for the acceptance of governments, such machinery as is calculated to safeguard the effectiveness of the obligation, freely undertaken, to submit to arbitration an existing dispute or future disputes.¹

Finally, the Commission recommended that the General Assembly should adopt the course contemplated in paragraph 1 (c) of Article 23 of the Commission's Statute, namely, 'recommend the draft to Members with a view to the conclusion of a convention'.²

The General Assembly, however, after a debate in the Sixth Committee extending over seven meetings, decided upon the alternative course of calling for further comments from Governments.³ Although the debate was full of interest, this is not the place to describe it in detail. Indeed, it would be premature to do so, since some delegates were altogether without instructions, and others had only a brief acquaintance with the report or had at best merely interim instructions from their Governments. It was clear, however, that there was a fairly sharp division of opinion between the supporters of the two conceptions of arbitration to which reference has already been made. Not surprisingly, the opponents of the conception of 'judicial arbitration' were more outspoken in their comments than were its supporters. Amongst those who made clear their firm opposition to 'judicial arbitration' were the delegates of Poland,⁴ Iran,⁵ Egypt,⁶ India,⁷ Byelorussian S.S.R.,⁸ Syria,⁹ Guatemala,¹⁰ Czechoslovakia,¹¹ and the Union of Soviet Socialist Republics.¹² More moderate opposition came from the delegates of Argentina,¹³ Brazil,¹⁴ Belgium,¹⁵ and Peru.¹⁶ The delegate of Argentina, in particular, disagreed with the Commission's view that the draft convention was in the main 'no more than a codification of existing law', although he did not contend that the Commission had exceeded its powers since it was entitled to prepare drafts which involved a measure of 'progressive development of international law' as well as mere codification of existing law.¹⁷ The delegate of Belgium, however, thought that the Commission had exceeded its powers by formulating a draft which related to the whole field of international justice rather than merely to arbitral procedure.¹⁸ Sympathy with the draft—though often of a very cautious kind—was expressed by the delegates of the Netherlands,¹⁹ Cuba,²⁰

¹ *Report of the International Law Commission, covering the work of its fifth session, June 1–August 14, 1953: General Assembly, Official Records, Eighth Session, Supplement No. 9 (A/2456), p. 3.*

² *Ibid.*, p. 8.

⁵ A/C.6/SR. 384.

⁸ *Ibid.*

¹¹ *Ibid.*

¹⁴ A/C.6/SR. 383.

¹⁷ *Loc. cit.*

¹⁹ A/C.6/SR. 382. The Netherlands Government seemed more sympathetic in the discussion than in their written comments.

³ A/C.6/L. 321.

⁶ A/C.6/SR. 385.

⁹ A/C.6/SR. 386.

¹² A/C.6/SR. 388.

¹⁵ *Ibid.*

⁴ A/C.6/SR. 383.

⁷ *Ibid.*

¹⁰ A/C.6/SR. 387.

¹³ A/C.6/SR. 386.

¹⁶ A/C.6/SR. 388.

¹⁸ *Loc. cit.*

²⁰ *Ibid.*

Norway,¹ Nationalist China,² Sweden,³ Uruguay,⁴ Greece,⁵ Pakistan,⁶ Panama,⁷ the United Kingdom,⁸ Canada,⁹ Afghanistan,¹⁰ Mexico,¹¹ New Zealand,¹² and Denmark.¹³ The delegate of Israel perhaps expressed a general feeling when he said that the draft convention 'had an undeniable scientific and practical value as being the result of thorough inquiry into the state of the modern international law relating to arbitration, with the addition of certain new elements not generally accepted'. He considered, however, that the draft qualified, under Article 38 (1) (d) of the Statute of the International Court of Justice, as a 'subsidiary means for the determination of rules of law'.¹⁴

Possibly the most searching observations were made by the delegate of France, who said that the Commission appeared to have abandoned not only the classic distinction between legal and political disputes, as enshrined in the Hague Conventions, the Covenant of the League of Nations, and the General Act, but also the distinction 'between disputes which could be and those which ought not to be submitted to arbitral procedure', i.e. the question of disputes relating to matters of domestic jurisdiction. The system of 'judicial arbitration' proposed by the Commission would involve a change in the entire procedure of the settlement of disputes. It would weaken the capacity of the International Court of Justice to deal with legal disputes and would reduce what was now 'the principal judicial organ of the United Nations' to 'a kind of secretariat of arbitration and a court of appeal'. For non-legal disputes, however, 'arbitration which operated automatically and was assimilated to legal procedure might seem too severe'. The Commission's draft was 'strong where it should be weak and weak where it should be strong'.¹⁵ The delegate of France was arguing in effect—as the Netherlands Government had done in their written comments¹⁶—that the conceptions of 'judicial settlement' and 'arbitration' should be kept entirely apart and that only harm would result from an attempt to fuse them into a single conception of 'judicial arbitration'. Finally, an important intervention was made by the delegate of the United States of America, who said that the draft contained 'a number of far-reaching innovations which Governments would have to consider carefully before adopting them'. The foremost innovation was the provision empowering the President of the International Court of Justice to appoint the members of the tribunal in the event of either of the parties failing to do so within a certain time. In his view, 'the traditional type of undertaking to have

¹ A/C.6/SR. 383.

⁴ Ibid.

⁷ Ibid.

¹⁰ Ibid.

¹³ A/C.6/SR. 388.

¹⁶ See above, pp. 167-8.

² Ibid.

⁵ A/C.6/SR. 384.

⁸ A/C.6/SR. 385.

¹¹ Ibid.

¹⁴ A/C.6/SR. 382.

³ Ibid.

⁶ Ibid.

⁹ A/C.6/SR. 386.

¹² A/C.6/SR. 387.

¹⁵ A/C.6/SR. 384.

recourse to arbitration frequently left the composition of the tribunal . . . to be decided upon later, and there was a presumption in such cases that the obligation to submit to arbitration was contingent on agreement . . . between the parties; unless governments were satisfied that their obligation was contingent on such agreement, they might not always be willing to assume the obligation in advance'. 'His Government', he continued, 'was not prepared for the moment either to become a party to a convention on the lines of the draft, or to participate in a conference convened to conclude such a convention.' But the delegate of the United States concluded by saying that the draft convention might have a certain use as a model 'in future arbitration agreements that the parties were particularly anxious to make effective', so that the best course might be 'for the General Assembly to take note of the draft convention and to refer it to governments with a view to their making use of its provisions in any arbitration agreement which they might decide to enter into'.¹

It is clear, therefore, that, having regard to the present state of the opinions of Governments, there is no immediate prospect of concluding a general multilateral convention on arbitration along the lines of the Commission's draft. There is, however, a sufficient measure of support for the principles of the draft to render possible the conclusion of a convention on a partial or optional basis. The way of practical progress seems that indicated by the delegate of the United States of America, namely, that the principles of the draft should be applied 'in future arbitration agreements that the parties were particularly anxious to make effective'. This method seems preferable on a number of grounds to the somewhat similar course proposed by the Netherlands Government in their written comments, which was that, while the convention as a whole should be proceeded with, States should be permitted either to adopt it with reservations or to except certain articles from ratification.² International law is better developed by modest conventions between a few States which are actually put into effect than by ambitious multilateral conventions which create an impression of progress but the effect of which is almost totally nullified by reservations.

III

The conception of 'judicial arbitration'

Whichever method is adopted for giving effect to some or all of the recommendations of the International Law Commission, the debate in the Sixth Committee shows the need for further study of one of the most important aspects of the Commission's proposals, namely, the conception of judicial arbitration. As the Commission made clear, this conception may involve, *inter alia*, the reference to the International Court of Justice,

¹ A/C.6/SR. 385.

² See above, p. 168.

at the instance of one party only, of the preliminary question whether there is an arbitrable dispute, and also—again at the instance of one party only—the constitution of the tribunal by the President (or Vice-President) of the Court. In so far, then, as what is contemplated involves an extension of the compulsory jurisdiction of the Court, it is easy to understand the opposition to the Commission's proposals on the part of those countries who are opposed in any case to the principle of compulsory judicial settlement. Governments who have not yet made the declaration in regard to compulsory jurisdiction under Article 36 (2) of the Statute of the Court are unlikely to welcome an initiative which would extend still further the compulsory jurisdiction of the Court. In the Commission's report, however, and in the comments of the Governments sympathetic to the draft, there may be detected the implication that little more is being asked of Governments under the draft than that they should abide by the undertaking to arbitrate which they themselves originally gave. Even if this implication be correct,¹ allowance must be made for psychological factors, and, in particular, the great difference—as it appears to some States—between arbitration before a panel of arbitrators chosen, even if indirectly, by Governments themselves and arbitration before arbitrators nominated by an outside agency, however impartial. For some countries the introduction of any compulsory element will be to destroy the attractiveness of arbitration altogether; for others, judicial arbitration will appear as but the thin end of the wedge of the compulsory judicial settlement of all disputes. What was deliberately rejected at San Francisco, it may be widely thought, must not be brought in surreptitiously through the back door at Geneva.

The answer no doubt to these fears, and to other fears expressed in the written comments of the Governments or in the Sixth Committee, is to make it abundantly clear—as has perhaps not been made sufficiently clear so far—that no State would be asked to accept further obligations except with its consent. What appears to be contemplated is that there should exist the following means of settling international disputes 'on the basis of respect for law', namely:

- (i) *traditional arbitration*, according to which 'it is rather easy for an unwilling party to find an excuse for shirking its engagements';
- (ii) *judicial arbitration*, of which the chief features are:
 - (a) objective determination of the preliminary question of 'arbitrability' by the International Court of Justice, and

¹ The implication, however, may not be correct. The real question is *what did the parties mean when they gave the original undertaking to arbitrate?* Did they mean that they would be ready to submit disputes to any body of impartial arbitrators, or *only* to a body of arbitrators the selection of which they could to a large extent control themselves? From the remarks of some delegates in the Sixth Committee it would seem to be clear that probably a majority of Governments would answer this question in the latter sense rather than in the former. See also p. 164, above.

- (b) appointment of arbitrators (if necessary) by the President of the Court; and
- (iii) *judicial settlement* (both 'voluntary' and 'compulsory') before the International Court of Justice.

No doubt a majority of the International Law Commission are impatient of 'traditional arbitration' and would like to see it give place to 'judicial arbitration', just as perhaps the same majority would prefer still more to see even 'judicial arbitration' give place to a more extensive system of compulsory judicial settlement. But, despite the very understandable fears expressed by the Netherlands Government, there appears to be no valid reason why those three methods of settlement according to law should not exist side by side, without overlapping, if it were thought desirable for them to do so. An example may be taken from municipal law. Apart from actions in the courts, English law has long recognized the validity of 'submissions to arbitration' as a means of settling disputes. Whereas, however, 'a submission to arbitration is not complete at common law unless and until an arbitrator is appointed',¹ Section 32 of the Arbitration Act, 1950, repeating a definition contained in Section 27 of the Arbitration Act, 1889, recognizes as an 'arbitration agreement', with all the consequences that flow therefrom,² 'a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not'. English law provides a clear example, in fact, of the imposition, on top of an earlier common law system not unlike arbitration as traditionally understood in international law, of a statutory system of judicial arbitration. In so far as the 'agreement to submit present or future differences to arbitration' referred to in the Act may not be in writing, the traditional system is not entirely extinct, so that the two systems (i.e. 'traditional arbitration' and 'judicial arbitration') may still be said to exist side by side under English law. Provided, therefore, that the distinction between the three methods of settling international disputes 'on the basis of respect for law' is kept clear, and provided also that the necessary steps are taken to secure the confidence of Governments by removing such misunderstandings as may exist, the introduction of a system of judicial arbitration into international law along the lines of the Commission's draft ought to be possible. By contrast with municipal law, where judicial arbitration can be imposed by statute, such a system would require to be introduced into international law by convention. Conventions providing for judicial arbitration would necessarily be confined at the beginning to those States not opposed to the principle of compulsory judicial settlement itself. For, as has

¹ Halsbury's *Laws of England*, vol. i (2nd ed., 1931), section 1071.

² Section 10 of the 1950 Act, for instance, gives power to the Court to appoint arbitrators or umpires in a number of cases.

been shown, judicial arbitration requires the acceptance of that principle at least in so far as the preliminary question of arbitrability is concerned. The most practical way of introducing judicial arbitration into international law would, therefore, appear to be that suggested by the delegate of the United States of America in the Sixth Committee, namely, the application, by States willing to accept them, of the principles proposed by the International Law Commission 'in future arbitration agreements that the parties were particularly anxious to make effective'.

While, however, there may be no inherent difficulty, legal or even political, in the path of the introduction of a system of judicial arbitration on a limited or optional basis, it remains to consider whether the system as proposed by the International Law Commission is fundamentally sound in itself and likely to be of value in international relations. The fear that the introduction of such a system will have a damaging effect on the practice of arbitration, as traditionally understood, and on judicial settlement, has been shown on analysis not to be a valid one provided that the distinction between the three methods of settling international disputes 'on the basis of respect for law' is kept absolutely clear. Correspondingly, there is no reason to regret or fear the introduction of yet another means of settling disputes alongside the existing means. International law is not yet so rich in machinery that it can afford to neglect any new machinery which may have some prospect of contributing to the settlement of disputes. At the same time it may be false, and even dangerous, to argue too much by analogy from municipal law. The conception of judicial arbitration has indeed come to secure a firm place in municipal law. But it must never be forgotten that the role of arbitration in municipal law is very different from that which it has traditionally had in international law. It has been shown that the choice of the arbitrators by the parties themselves has traditionally been the fundamental feature of arbitration under international law.¹ In municipal systems, however, while the choice of the arbitrators by the parties themselves may be important, it is not for them the chief feature of the procedure, as compared with other advantages such as speed, convenience, and economy. In international law, however, the position is entirely different. There is no reason to suppose that proceedings before arbitral tribunals are any quicker or more convenient than proceedings before the International Court of Justice, while they are (for the parties) not less but more costly.² These factors are unimportant compared with the all-

¹ See above, pp. 164-5.

² At present, in cases before the International Court of Justice, a relatively long time may elapse between the filing of the Application and the delivery of the Judgment. The pace is, however, dictated by the parties themselves as much as by the Court which, even in involved affairs such as the *Anglo-Norwegian Fisheries* case and the *Minquiers and Ecrehos* case, gave judgment within six weeks of the close of the oral hearings. Should the parties make known their wish for a case to be decided within a comparatively short period, there is nothing in the Statute or Rules

important factor of the choice of the arbitrators by the parties themselves. For these reasons, while it is clear that States opposed to compulsory judicial settlement are unlikely to accept judicial arbitration, it may also happen that those States who have accepted the principle of compulsory judicial settlement may see no particular advantage in subscribing as well to the principle of judicial arbitration. Such States may be ready to refer certain classes of disputes to judicial settlement. They may wish, however, to go no further in regard to other classes of disputes than to accept the principle of traditional arbitration. They may consider that for them judicial arbitration has no advantages, only disadvantages. The more are such considerations likely to be deemed relevant, if it be remembered that, in regard to those States who have made the declaration under Article 36 (2) of the Statute of the Court either with no reservations at all or with no material reservations, it is already possible to secure an objective determination by the Court of the preliminary question of 'arbitrability'. For an alleged breach of an undertaking to arbitrate clearly raises a question concerning 'the interpretation of a treaty', which is *ipso facto* referable to the Court under Article 36 (2). All that is required to bring States already bound by declarations under Article 36 (2) into a comprehensive system of judicial arbitration is that, in those cases—which are likely to be rare—where the undertaking to arbitrate itself contains no provisions as to the constitution of a tribunal, they should accept, failing agreement with the other party, constitution of the tribunal by the President of the Court. It has already been suggested, however, that this may be one of the most questionable features of the system of judicial arbitration now proposed, and that it requires further study.¹ It would also be important no doubt for any such study not to neglect the various substantive issues raised by the French delegate in the Sixth Committee. The question of the distinction between legal and political disputes—and especially between arbitrable and non-arbitrable disputes—is one, for example, which, until resolved to the satisfaction of a majority of Governments,² must necessarily reduce the efficacy of international arbitration, 'judicial' or otherwise, and must

of Court which would prevent the Court from complying with such a wish. The reason why (for the parties) the cost of cases before the Court is less than that of cases submitted to arbitration is that, in a case before the Court, the parties as a rule pay their own expenses only, whereas, in a case submitted to arbitration, they must pay not only their own expenses, but also the fees and expenses of the arbitrators. The general expenses of the Court are paid by all the parties to the Statute although, under Article 35 of the Statute, the Court may call upon a State which has appeared in a case before it, and which is not otherwise bearing a share of the expenses of the Court, to make a contribution.

¹ See above, p. 158.

² The question has probably already been resolved to the satisfaction of the majority of writers in that the distinction is believed to be unscientific and misleading. According to the view now generally accepted, any dispute is capable of settlement 'on the basis of respect for law', provided only that the parties have established the necessary machinery for securing such settlement.

also greatly enhance the difficulty of securing agreement on the settlement of international disputes according to law. But, in regard particularly to the constitution of arbitral tribunals, the study should pay special attention to the fear expressed by the French delegate that the International Court of Justice might become 'a kind of secretariat of arbitration'. It is certainly not in the interests of the administration of international law that the Court should become concerned with preliminary questions of arbitrability—cases of the *Ambatielos* type, for example—to the exclusion of substantive questions. The possibility might therefore be considered of referring such preliminary questions to Chambers of the Court rather than to the full Court. In a reform of the Statute, for example, questions of 'arbitrability' might be added to the 'particular categories of cases' with which the Chambers are already competent to deal under Article 26 (1). The Chambers too, rather than the President, might even be given the task of appointing arbitrators, and provisions for the exercise of this duty, whether exercised by the Chambers or by the President, ought perhaps to be written expressly into the Statute. Alternatively, if it were thought desirable to separate the function of appointing arbitrators altogether from the functions of the International Court of Justice, consideration might be given to reviving the activity of the Permanent Court of Arbitration which, rather than any other body, might seem qualified to act as a 'secretariat of arbitration'.

SELF-EXECUTING TREATIES IN THE UNITED STATES OF AMERICA

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THE obligation of a State to fulfil international agreements contracted by it is a fundamental principle of international law. While, in general, this principle precludes a plea that a treaty cannot be enforced having regard to peculiarities of municipal law,¹ nevertheless the process of enforcement, being essentially a municipal law matter, may be impeded by considerations of municipal law such as conflicting views in the sphere of constitutional law or differences as to the scope of powers of governmental institutions. The distinction between 'self-executing treaty' and 'non-self-executing treaty' is among the considerations which may affect the enforcement by a State of its international agreements. That distinction is not of acute concern in some States, for example France, where a self-executing treaty, approved by the National Assembly, has 'special authority' as law. But in the United States of America the definition of 'self-executing treaty' and the effect of such an agreement in municipal law have on occasions been a highly controversial matter, involving, as it does, such questions as the constitutional distribution of powers within the Federal Government and between the Federal Government and the States, as well as the problem of the protection of the rights of the individual. It is the purpose of the present article to analyse, by means of a brief survey of the treaty practice of the United States, the implications in municipal law—and, thereby, for international law—of the term 'self-executing treaty'. In a Note appended to this article an attempt is made to survey the practice of various other States on the subject.

I

Origin of the treaty-making power

The scope of the treaty-making power and the status of treaties have been a matter of interest and occasional concern in the United States from time

¹ It was stated by the Permanent Court of International Justice in its Advisory Opinion regarding the *Exchange of Greek and Turkish Populations* that there is '... a principle which is self-evident, according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken' (*P.C.I.J.*, Series B, No. 10, p. 20). The Court declared in its Advisory Opinion on the *Treatment of Polish Nationals in Danzig* that Poland could not avoid an obligation on the pretext that the terms of an international agreement had not been incorporated into Polish municipal law (*ibid.*, Series A/B, No. 44, p. 24). See also the Advisory Opinion on the *Jurisdiction of the Courts of Danzig* (*ibid.*, Series B, No. 15, pp. 17-21, 26-27). For a careful analysis of the problem of constitutional limitations on treaty-making, with recommendations, see United Nations, International Law Commission, *Report on the Law of Treaties* by H. Lauterpacht, Special Rapporteur (U.N. Doc. A/CN.4/63 (1953), pp. 157 ff.).

to time since the founding of the Republic. Indeed, the Constitutional Convention of 1787 was inspired in large measure by a treaty problem, the non-execution of the Treaty of Peace of 1783 with Great Britain. From 1781 to 1789 the United States was governed under the Articles of Confederation, which provided for a loose union of the thirteen former colonies, with the central authority vested in Congress. The powers of Congress were strictly defined, the residual power being vested in the several States.¹ Congress was granted control over foreign relations, subject to certain restrictions.² In regard to the execution of treaties, Congress was dependent on the will of the sovereign States, as it could only recommend that the States take appropriate measures to enforce treaties or exhort State authorities and the citizens in general to observe the treaty obligations of the country.³ While the reasons for the existence of this permissive method of executing treaties can be understood in the light of the considerations—political and economic—which underlay the loose Confederation, the new State was seriously handicapped in the conduct of foreign affairs by that manner of devolution of the treaty-making power.

The extent of the handicap became evident in regard to the execution of the Definitive Treaty of Peace with Great Britain of 3 September 1783.⁴ As soon as the Treaty was ratified in 1784, Congress by resolution recommended that the States 'reconsider and revise all their acts and laws' to make them conform to the provisions of the Treaty.⁵ Two years later the Secretary for Foreign Affairs, Mr. Jay, reported to Congress a discouraging response by the States to the resolution.⁶ Mr. Jay took the position that a valid treaty should be regarded as legally binding upon the United States as a whole, without additional approval by the individual States.⁷ In response to his views, Congress passed certain resolutions requesting the repeal of State laws repugnant to the terms of the Treaty of Peace and providing that treaties constitutionally concluded become '... part of the law of the land, and are not only independent of the will and power of ... [State] legislatures, but also binding and obligatory on them'.⁸ While ten

¹ Articles 6 and 9: United States Constitution, Sesquicentennial Commission, *History of the Formation of the Union under the Constitution* (1935), pp. 534, 536.

² No treaty could be concluded which would interfere with the power of the States to establish customs duties or to engage in foreign trade, and no treaty or alliance could be made without the consent of at least nine of the thirteen States (Article 9, loc. cit., p. 538). For their part, the States were forbidden to make treaties without the consent of Congress or to adopt any customs duties which might interfere with certain treaty projects of Congress (Article 6, *ibid.*, p. 535).

³ See, for example, Continental Congress, *Secret Journals of the Acts and Proceedings of Congress* (1821), vol. ii, pp. 569–70, vol. iii, pp. 318, 395 (hereinafter cited as *Secret Journals*).

⁴ 8 Stat. 80.

⁵ *Secret Journals*, vol. iii, pp. 433–43, 444–5, 445–6.

⁶ United States Congress, *American State Papers, Class I: Foreign Relations*, vol. i, p. 228; *Secret Journals*, vol. iv, pp. 185–287.

⁷ *Ibid.*, p. 204.

⁸ *Ibid.*, pp. 282–3, 295–6, 329–8. This position of Congress was later affirmed by the Supreme Court of the United States in *Ware v. Hylton* (1797), 3 Dall. 199.

States made some gesture towards complying with the resolutions during the next year, the execution of the Treaty continued to be an issue between the United States and Great Britain.

The Convention held in 1787 for the revision of the Articles of Confederation concluded its sessions with a new Constitution for the United States. One of the issues discussed at the Convention was the nature and scope of the treaty-making power and the agencies of government which should exercise this power. It was the general consensus of the Convention that the treaty-making power must come within the exclusive purview of the Federal Government, that treaties must be binding upon the States, and that treaties, alongside federal statutes and the Constitution itself, should be the supreme law of the land.¹ With regard to the exercise of the treaty-making power, several alternatives were advanced: granting the power exclusively to the Senate; permitting the Senate and the House of Representatives to share the power of ratification; and dividing the power between the President and the Senate.² In the final document, the President was granted the 'power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur',³ while with regard to the status of treaties in the constitutional system it was provided that

'This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.'⁴

The omission of the House of Representatives from participation in treaty-making did not pass unchallenged during the Constitutional Convention.⁵ At several of the State conventions called to ratify the new Constitution the matter was discussed and amendments were offered to rectify the omission. However, the Constitution was approved without change.⁶

Several points pertinent to the discussion of self-executing treaties in the United States emerge from this brief examination of the historical background of the present treaty-making power. Experience under the Articles of Confederation lent support to the decision of the Constitutional Con-

¹ See Farrand, *Records of the Federal Convention of 1787* (1911), vol. i, pp. 54, 164.

² Farrand, *op. cit.*, vol. ii, pp. 183, 297-8, 392-4, 540-1, 548.

³ Article II, s. 2.

⁴ Article VI, paragraph 2, commonly referred to as the 'supremacy clause'.

⁵ The point was made that '... as treaties ... are to have the operation of laws, they ought to have the sanction of laws also' (Farrand, *op. cit.*, vol. ii, p. 538).

⁶ The arguments for the omission of the House of Representatives were succinctly stated by Hamilton in *The Federalist*, No. LXXV, ed. by Ford (1898), pp. 502-3: 'Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, *secrecy*, and dispatch, are incompatible with the genius of a body so variable and so numerous.'

vention that, in a federal system, the conclusion of treaties must necessarily be within the exclusive competence of the Central Government and that treaties must take precedence over the constitutions and laws of the several States. There was, on the other hand, disagreement both within the Convention and in several of the State ratifying-conventions concerning the actual process of treaty-making, especially in the matter of the advisability of excluding the House of Representatives from the process in view of the fact that treaties were to have the status of law in the country. This agitation for the inclusion of the House of Representatives might be regarded, by implication, as an argument against the concept of self-executing treaties, that is, against treaties which could impose a rule of law directly on the country without submission to legislative procedure. Subsequent experience indicates that it was also an argument against any assumption that the implementation of a non-self-executing treaty was either a legal or a moral duty of the House of Representatives in its role as one house of Congress. Fundamental to the picture, of course, is an appreciation of the suspicion, arising from colonial experience, of the unlimited exercise of Executive power. While consent of the Senate to the ratification of treaties was instituted as a check on the treaty-making power of the President, the 'unrepresentative' character of that house, which was not popularly elected, formally, until 1913, rendered this control less than rigorous.

II

The courts and self-executing treaties

Given the controversies associated with the inception of the treaty-making power of the United States, it was inevitable that the meaning and scope of the constitutional provisions governing treaties, especially of the 'supremacy clause', should be the subject of judicial examination. A survey of selected cases gives an indication of the nature of the treatment in the courts of the United States of such questions as whether a treaty is subject to the constitutional limitations which are placed upon federal statutes, whether the relation between a treaty and a statute is governed by the rule *lex posterior derogat priori*, and whether a treaty can be effective as law *ex proprio vigore*.

A distinction may be drawn between the 'capacity' of the United States as a sovereign State to enter into international agreements and the delegated power of the Federal Government to make binding international agreements in pursuance of 'the authority of the United States'.¹ Although

¹ Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, 2nd revised ed. (1947), vol. ii, pp. 1388-9. See, in general, Crandall, *Treaties, Their Making and Enforcement* (2nd ed., 1916).

the capacity of the United States to make treaties cannot be assumed to be less than that of other countries, the full delegation to the Federal Government by the States of their authority to make treaties is implicitly limited by the assumption that no treaty can contravene the terms of the organic act in which this delegation of power is confirmed.¹ This fundamental limitation on the treaty-making power has been recognized more than once by the Supreme Court.² While it may be assumed, then, that no treaty can abolish the federal system, for example, or legalize bills of attainder, the question may be raised as to the extent to which the Federal Government may by treaty affect matters which fall within the purview of the States. The range of subject-matter of commercial treaties is in point. For a century and a half the Supreme Court has consistently upheld the provisions of treaties which affect the area of State powers. In most instances these have been self-executing treaties.³

The decision in the case of *Missouri v. Holland*⁴ has been advanced by critics of the treaty-making power as a significant example of the way in which the Constitution can be contravened by misuse of this power. The case arose out of efforts which were being made by the Federal Government in the early years of the twentieth century to initiate a programme of conservation of natural resources. An Act of Congress passed in 1913 prohibiting the wholesale destruction of migratory wild fowl⁵ was successfully challenged as being outside the scope of the powers delegated to the Federal Government.⁶ In 1916 the United States concluded a treaty with Great Britain for the protection of migratory birds which provided that the parties would adopt appropriate regulatory legislation to give effect to the agreement.⁷ The implementation of this non-self-executing treaty by Congress was challenged on the grounds that legislation which had been held to be an unconstitutional interference with the reserved powers of the States when enacted in pursuance of the powers of Congress was no more valid when enacted in pursuance of the terms of a treaty.⁸ In sustaining the

¹ Hyde, op. cit., vol. ii, p. 1390. It may be noted that this was an absolute delegation of authority, for, by the terms of Article I, s. 10, of the Constitution, 'no State shall enter into any treaty, alliance, or confederation . . . '.

² In *Geofroy v. Riggs* (1890), 133 U.S. 258, at p. 267, the Court held with regard to the treaty-making power that ' . . . it would not be contended that it exists so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent'. See also *Doe v. Braden* (1853), 16 How. 635, at p. 657; *The Cherokee Tobacco* (1870), 11 Wall. 616, at p. 620.

³ See, for example, *Georgia v. Brailsford* (1794), 3 Dall. 1; *Ware v. Hylton* (1797), 3 Dall. 199; *Fairfax's Devisee v. Hunter's Lessee* (1813), 7 Cranch 603; *Hauenstein v. Lynham* (1879), 100 U.S. 483; *Santovincenzo v. Egan* (1931), 284 U.S. 30.

⁴ (1920), 252 U.S. 416.

⁵ 37 Stat. 847.

⁶ *United States v. Shawver* (1914), 214 F. 154; *United States v. McCullagh* (1915), 221 F. 288.

⁷ 39 Stat. 1702.

⁸ *Missouri v. Holland* (1920), 252 U.S. 416, at p. 424. The State of Missouri was seeking to prevent the enforcement of the Migratory Bird Treaty Act of 1918 (40 Stat. 755).

constitutionality of the enabling Act, Mr. Justice Holmes stated that 'Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States.'¹ Some critics of this decision have found in it an indication that the Supreme Court has, in effect, proclaimed the supremacy of treaties over the Constitution.² If the historical context of Article VI, paragraph 2, of the Constitution be remembered, these dangers are not implicit in Mr. Justice Holmes's statement. Nor, indeed, did he intend any such inference, for he continued: 'We do not mean to imply that there are no qualifications to the treaty-making power. . . .'³ Pointing out that the States cannot undertake conservation measures which require international co-operation—for, of course, the States cannot make treaties—he concluded that 'the treaty in question does not contravene any prohibitory words to be found in the Constitution'; it represented an appropriate exercise of the treaty-making power for the purpose of protecting the national interest.⁴ It may be added that, unlike the situation in Canada, the implementation of treaties in the United States is wholly within the power of the Federal Government.⁵

With regard to a conflict in terms between a treaty and an Act of Congress, in the United States it is the generally accepted rule that the treaty or statute later in date supersedes the earlier.⁶ There appear to be no cases in which an Act of Congress has been found to supersede a treaty. The Supreme Court held in 1933, however, that the Treaty with Great Britain of 1924⁷ for the Prevention of the Smuggling of Intoxicating Liquors, 'being later in date than the [Tariff] Act of 1922, superseded, so far as inconsistent with the terms of the Act, the authority which has been

¹ *Missouri v. Holland*, *ubi supra*, at p. 433.

² United States Senate, Committee on the Judiciary, *Hearings on S. J. Res. 1 and S. J. Res. 43*, 83rd Congress, 1st Session, pp. 106-8, 115-17.

³ *Missouri v. Holland*, *ubi supra*, at p. 433.

⁴ *Ibid.* For a thoughtful analysis of *Missouri v. Holland* and the criticisms directed against it, see the memorandum by Senator Alexander Wiley, Chairman of the Senate Foreign Relations Committee, *Cong. Rec.*, 83rd Congress, 1st Session, p. A 4469.

⁵ It would be possible, of course, to have a treaty implemented by the States. For example, with reference to the execution of certain provisions of the Treaty of Washington with Great Britain of 1871 (17 *Stat.* 863), President Grant informed Congress in his annual message of 4 December 1871 that he had 'addressed a communication . . . to the governors of New York, Pennsylvania, Ohio, Indiana, Michigan, Illinois, and Wisconsin, urging upon the governments of those States, respectively, the necessary action on their part to carry into effect the object of the article of the treaty which contemplates the use of the canals, on either side, connected with the navigation of the lakes and rivers forming the boundary [i.e. between the United States and Canada], on terms of equality, by the inhabitants of both countries. It is hoped that the importance of the object and the benefits to flow therefrom will secure the speedy approval and legislative sanction of the States concerned.' United States Department of State, *Foreign Relations*, 1871, p. iv. Experience under the Articles of Confederation would militate against resort to this type of action.

⁶ See, for example, *The Cherokee Tobacco* (1870), 11 Wall. 616, at p. 620; *Whitney v. Robertson* (1888), 124 U.S. 190; *Hijo v. United States* (1904), 194 U.S. 315; *United States v. Lee Yen Tai* (1902), 185 U.S. 213.

⁷ 43 *Stat.* 1761.

conferred by s. 581 upon officers of the Coast Guard to board, search, and seize beyond our territorial waters'.¹ In practice, the American courts, like the courts in France, the Netherlands, or Mexico, for example,² will avoid an interpretation which might suggest that Congress had the intention of abrogating a treaty for the purposes of municipal law by the device of enacting a statute; similarly, the courts will make an effort to avoid a construction of a treaty which might lead to the supersession of a Federal statute.³

While, in general terms, a self-executing treaty may override conflicting State legislation or supersede conflicting Federal statutes earlier in date than the international agreement, the exact definition of 'self-executing treaty' and the full effect as law of such an instrument has been a difficult matter to determine. In 1799 a Federal district court ordered the surrender of a fugitive to Great Britain on the ground that the extradition provisions of the Jay Treaty of 1794 created a rule which could be enforced directly by the courts, although the defence had contended that the courts could not take such action in the absence of statutory provision therefor.⁴ In a later case, involving extradition in pursuance of the Webster-Ashburton Treaty of 1842 with Great Britain, a circuit court took the view that not only was the act of surrender 'chiefly ministerial', but that the procedure provided by the Treaty was sufficient, with the result that legislative implementation was not required.⁵ Two years later, however, the Supreme Court of New York refused to accept this point of view and insisted that

¹ *Cook v. United States* (1933), 288 U.S. 102, at pp. 118-19. This Treaty provided for termination should the parties 'be prevented either by judicial decision or legislative action from giving full effect to the provisions of the present treaty . . .' (43 Stat. 1761, at p. 1763). Presumably the negotiators entertained some doubt as to whether this Treaty could be sustained in the courts.

² See *infra*, pp. 194, 198, 204.

³ See, for example, *Chew Heong v. United States* (1884), 112 U.S. 536, at p. 549; *Pigeon River Improvement, Slide & Boom Co. v. Cox* (1934), 291 U.S. 138, at p. 160; *Moser v. United States* (1951), 341 U.S. 41, at p. 45.

⁴ *United States v. Robbins* (1799), 27 Fed. Cas. 825, at pp. 829-31, 833. Surrender of Robbins was requested pursuant to Article 27 of the Jay Treaty (8 Stat. 116, at p. 129). Objection was raised in the House of Representatives that legislative implementation of this provision was necessary before he could be surrendered (*Annals of Congress*, 6th Congress, 1st Session, pp. 511, 515-18, 532-3). John Marshall, soon to become Chief Justice of the Supreme Court, defended the action of the District Court and President Adams's subsequent surrender of the fugitive to Great Britain on the ground that 'the treaty, which is a law, enjoins the performance of a particular object. . . Congress, unquestionably, may prescribe the mode [of execution], and Congress may devolve on others the whole execution of the contract; but till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses.' (*Ibid.*, pp. 613-14.) This argument was resorted to in *Ex parte Toscano* (1913), 208 F. 938, which concerned the enforcement of the internment provisions of Hague Convention No. V of 1907. See also *United States v. Schooner Peggy* (1801), 1 Cranch 103, at p. 109, in which an Admiralty judgment was set aside in consideration of the terms of a later Treaty with France.

⁵ *Re Sheazle et Al. (The British Prisoners)* (1845), 21 Fed. Cas. 1214, at p. 1217. Surrender was being made under Article 10 of the Treaty (8 Stat. 572, at p. 576). Two years earlier, the Attorney General of the United States had taken the same position as the Circuit Court in regard to the extradition provisions of this agreement (United States Department of Justice, *Official Opinions of the Attorneys General*, vol. iv, pp. 208, 209-10).

'the president cannot execute the power of extradition without both legislative and judicial sanction previously obtained'.¹ While the controversy was settled for practical purposes of extradition by Federal legislation in 1848, designed to implement existing and future extradition treaties,² there emerged an indication of the meaning of 'self-executing treaty', i.e. a treaty which prescribes by its own terms a rule for the Executive or for the courts or which creates obligations for individuals enforceable without legislative implementation. Following the lines of this definition, the scope of possible action under a treaty which may be described as 'self-executing' might appear to be virtually unlimited—save, of course, where treaty terms required congressional implementation explicitly, or implicitly as would be necessary for an appropriation of money.³ A limitation of these wide possibilities was supplied, however, by Chief Justice Marshall in the case of *Foster v. Nielson*.⁴

The case involved a consideration of the effect upon perfected private land titles of the phrase 'shall be ratified and confirmed to those in possession' which appears in Article 8 of the Treaty of Amity, Settlement and Limits with Spain of 22 February 1819.⁵ The Chief Justice took the view that as the expression was the 'language of contract', the Article required legislative implementation before the titles could be assured to their possessors.⁶ His argument, which has often been cited by courts in discussions of the difference between self-executing treaties and non-self-executing treaties, ran as follows:

'A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

'In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.'

Actually, however, the Chief Justice appears to have overlooked the fact that a treaty might also be implemented by the Executive branch, or, indeed, by the State Governments. His definition was later qualified in consideration of the fact that the Spanish and English texts of the Treaty with

¹ *Re Metzger* (1847), 1 Barb. 248, at p. 271.

² 9 Stat. 302.

³ It is possible to argue, however, that since the Constitution only requires that appropriations be made by law (Article I, s. 9, clause 7) and as treaties have the status of law, appropriations may be made by treaty. See Feidler and Dwan, 'The Extent of the Treaty-Making Power', in *Georgetown Law Journal*, 28 (1939-40), p. 192.

⁴ (1829), 2 Pet. 253.

⁵ 8 Stat. 252, at p. 258.

⁶ 2 Pet. 253, at p. 315.

⁷ *Ibid.*, at p. 314.

Spain were not identical, so that with regard to the same phrase of Article 8 the Chief Justice stated:

'Although the words "shall be ratified and confirmed", are properly the words of contract, stipulating for some future legislative act; they are not necessarily so. They may import that they "shall be ratified and confirmed" by force of the instrument itself. When we observe that in the counterpart of the same treaty, executed at the same time by the same parties, they are used in this sense, we think the construction proper, if not unavoidable.'¹

In terms of subject-matter, very broad distinctions between self-executing and non-self-executing treaties may be discerned in judicial practice. Courts have held as a matter of *dictum* or, less often, as part of *ratio decidendi*, that the term 'self-executing' is applicable in the following instances: where existing legislation is adequate for enforcement of a treaty;² confirmation of perfected land titles to a private owner in cessions of territory;³ guarantees of reciprocal rights to citizens and aliens in regard to residence, business activity, licences, &c., found in commercial treaties;⁴ unconditional most-favoured-nation provisions of commercial treaties;⁵ customs exemptions;⁶ protection of trade marks under the Inter-American Convention for the Protection of Trade-Marks;⁷ establishment of the boundary between the United States and Canada in pursuance of the Boundary Convention of 1908;⁸ the internment provisions of Hague Convention No. V of 1907;⁹ the rules concerning liability in international air transport under the Warsaw Convention of 1929;¹⁰ protection of seamen under the Shipowner's Liability Convention of 1936;¹¹ adjudication of claims of aliens against the United States;¹² privileges and immunities of the United Nations pursuant to Articles 104 and 105 of the Charter.¹³

¹ *United States v. Percheman* (1833), 7 Pet. 51, at pp. 88-89.

² *Petition of Georgakopoulos* (1948), 81 F. Supp. 411, at p. 413.

³ *United States v. Percheman* (1833), 7 Pet. 51; *United States v. Moreno* (1864), 1 Wall. 400, at p. 404. The title would not be guaranteed against loss 'by foreclosure, sales under execution, trespasses, adverse possession, and other non-governmental acts': *Amaya v. Stanolind Oil and Gas Co.* (1946), 158 F. 2d 554, at p. 558.

⁴ *Head Money Cases* (1884), 112 U.S. 580, at pp. 598-9; *Asakura v. City of Seattle* (1924), 265 U.S. 332, at p. 341.

⁵ *J. T. Bill Co., Inc. v. United States* (1939), 104 F. 2d 67, at p. 73.

⁶ *United States v. Garrow* (1937), 88 F. 2d 318, at p. 320. It was held by the Court, however, that the exemption was terminated by the War of 1812 (*ibid.*, p. 323).

⁷ *Bacardi Corp. of America v. Domenech* (1940), 311 U.S. 150, at p. 161.

⁸ *Pettibone v. Cook County, Minn.* (1941), 120 F. 2d 850, at p. 855.

⁹ *Ex parte Toscano* (1913), 208 F. 938, at p. 942.

¹⁰ *Garcia v. Pan American Airways* (1945), 55 N.Y.S. 2d 317, at p. 322; *Indemnity Insurance Company of North America v. Pan American Airways* (1944), 58 F. Supp. 338. In the latter case the argument that the Warsaw Convention must be non-self-executing because in the United Kingdom an Act of Parliament was necessary to put it into effect, was held inapplicable in the United States in view of the 'supremacy clause' of the Constitution (at p. 340).

¹¹ *Warren v. United States* (1951), 340 U.S. 523, at pp. 526-7.

¹² *Hannevig v. United States* (1949), 84 F. Supp. 743.

¹³ *Curran v. City of New York* (1947), 77 N.Y.S. 2d 206, at p. 212. Cf. *Balfour, Guthrie and Co. v. United States* (1950), 90 F. Supp. 831.

With regard to the scope of the term 'non-self-executing treaty', the decisions of courts suggest that legislative implementation is required in the following instances, either because the agreement is non-self-executing in terms or because the subject-matter falls within the enumerated powers of Congress: confirmation of land titles which were not perfected before the cession of territory;¹ grant of patents to public lands;² disposal of money obtained from the sale of public lands as well as the appropriation of money;³ conditional most-favoured-nation clauses of commercial treaties;⁴ affirmation of rights in industrial property under the various conventions for the protection of industrial property.⁵

The Tariff Act of 1922 authorized the Coast Guard to visit and search vessels suspected of violating laws of the United States if the vessels were found within a zone extending four leagues from the coast.⁶ The Treaty with Great Britain of 1924 regarding the Smuggling of Intoxicating Liquor substituted for this zone a distance traversible in one hour from the coast.⁷ The question arose as to whether by the terms of the Treaty the unloading of liquor within the prohibited zone could be made a crime. The District Court of Connecticut held that 'it is not the function of treaties to enact the fiscal or criminal law of a nation. For this purpose no treaty is self-executing.'⁸ The Supreme Court later decided, in a case involving the same Treaty and the re-enactment in the Tariff Act of 1930 of the provision regarding the four-league zone, that 'the treaty was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions'.⁹

State constitutions and laws can be rendered inoperative by the terms of a self-executing treaty.¹⁰ Experience would suggest that resort to this method of terminating discriminatory State legislation, for instance, cannot be lightly undertaken. The California Alien Land Law provided that an alien ineligible for citizenship could not acquire title to land in the State and that if such alien should attempt to evade this provision through

¹ *United States v. Sandoval* (1897), 167 U.S. 278; *Ainsa v. New Mexico and Arizona Railroad Co.* (1899), 175 U.S. 76; *Bolshanin v. Zlobin* (1948), 76 F. Supp. 281.

² *Parker v. Duff* (1874), 47 Cal. 554, at p. 566.

³ *Turner v. American Baptist Missionary Union* (1852), 24 Fed. Cas. 344, at pp. 345-6.

⁴ *Bartram v. Robertson* (1887), 122 U.S. 116, at p. 120; *Whitney v. Robertson* (1888), 124 U.S. 190, at pp. 194-5.

⁵ *Accumulator Co. v. Julian Electric Co.* (1893), 57 F. 605, at p. 615; *Re Stoffregen* (1925), 6 F. 2d 943; *Robertson v. General Electric Co.* (1929), 32 F. 2d 495. Cf. *Bacardi Corp. of America v. Domenech* (1940), 311 U.S. 150; *Portuondo v. Columbia Phonograph Co., Inc.* (1937), 81 F. Supp. 355.

⁶ 42 Stat. 858, at p. 979.

⁷ 43 Stat. 1761. Similar treaties were concluded with fifteen other States.

⁸ *The Over the Top* (1925), 5 F. 2d 838, at p. 845. Cf. *The Pictorian* (1924), 3 F. 2d 145. See Dickinson, 'Are the Liquor Treaties Self-Executing?', in *American Journal of International Law*, 20 (1926), p. 444.

⁹ *Cook v. United States* (1933), 288 U.S. 102, at pp. 118-19.

¹⁰ See the cases cited *supra*, p. 182, n. 3.

conveyance to a third person, the property in question would escheat to the State.¹ In 1948 the Supreme Court held that the latter provision, Section 9 (a), of the Act was violative of the equal protection clause of the Fourteenth Amendment to the Federal Constitution.² In a concurring opinion, Mr. Justice Black suggested that the entire Alien Land Law should be held invalid as violative of the equal protection clause, and added—referring to Articles 55 and 56 of the Charter of the United Nations:

'... we recently pledged ourselves to cooperate with the United Nations to "promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without discrimination as to race, sex, language, or religion". How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?'

Apparently taking a cue from this statement, the District Court of Appeal (State of California), in the case of *Fujii v. California*,⁴ went so far as to hold that the provisions of Articles 55 and 56 of the Charter as well as the Preamble and Articles 1 and 2 were self-executing, and, hence, could invalidate those sections of the Alien Land Law which had not been affected by the decision of the United States Supreme Court in *Oyama v. California*.⁵ The District Court of Appeal held that the pertinent provisions of the Alien Land Law were 'contrary both to the letter and to the spirit of the [United Nations] Charter which, as a treaty, is paramount to every law of every state in conflict with it'.⁶ This 'very bold construction of the Charter'⁷ gave rise to marked criticism in legal and legislative circles.⁸ It intensified the discussion of the meaning of the term 'self-executing treaty' and of the legal scope of such instruments in the constitutional system which had been revived in the course of the Senate Foreign Relations Committee's consideration of the advisability of approving the Genocide Convention.⁹ The decision gave impetus to the movement to amend the constitutional provisions concerning the treaty-making power.

While the view of the District Court of Appeal regarding the concept of self-executing treaties was not original, the description of the cited provisions of the Charter as 'self-executing' was in the nature of a departure.¹⁰

¹ See *Deering's General Laws*, vol. i (1944 ed.), p. 129.

² *Oyama v. California* (1948), 332 U.S. 633.

³ At pp. 649-50. A similar reference to the Charter was made by the High Court of Ontario (Canada) in *Re Wren: Annual Digest and Reports of Public International Law Cases*, 1943-5, Case No. 50, p. 179.

⁵ *Ubi supra*.

⁴ (1950), 217 P. 2d 481.

⁶ At p. 488.

⁷ Fairman, 'Finis to Fujii', in *American Journal of International Law*, 46 (1952), p. 688.

⁸ See, for example, *Cong. Rec.*, 81st Congress, 2nd Session, pp. 5993-6000; Hudson, 'Charter Provisions on Human Rights in American Law', in *A.J.* 44 (1950), p. 543. Cf. Wright, 'National Courts and Human Rights—The Fujii Case', *ibid.* 45 (1951), p. 62.

⁹ United States Senate, Committee on Foreign Relations, *Hearings on Executive O, Genocide Convention*, 81st Congress, 2nd Session.

¹⁰ See Report of the Secretary of State (Stettinius) to the President on the San Francisco Conference, United States Senate, Committee on Foreign Relations, *Hearings on the Charter of*

On appeal to the Supreme Court of California it was held that the Alien Land Law was unconstitutional as being a denial of the equal protection clause of the Fourteenth Amendment, an argument which appears to have a basis in a number of similar cases involving discriminatory State legislation and decided by the Supreme Court of the United States.¹ In the course of its judgment the Supreme Court of California reviewed the contention which had been put forward in the Court below as to the self-executing nature of the cited provisions of the Charter:

'It is clear that the provisions of the preamble and of Article 1 of the charter which are claimed to be in conflict with the alien land law are not self-executing. They state general purposes and objectives of the United Nations Organization and do not purport to impose legal obligations on the individual member nations or to create rights in private persons. It is equally clear that none of the other provisions relied on by plaintiff is self-executing.'²

The Court drew a distinction between the language employed in Articles 55 and 56, which does not create rights and duties as would self-executing provisions, and the language employed in Articles 104 and 105, which indicates that these latter Articles are self-executing, as, indeed, they have been so regarded.³ The ruling of the Supreme Court of California seems to be in accordance with the trend of the decisions of the Supreme Court of the United States in similar cases involving discriminatory State legislation. At the same time, it disposes of the somewhat controversial resort of the lower State Court to an argument based on the concept of self-executing treaties. It should be noted, however, that the controversy over the case of *Fujii v. California* does not mean that a self-executing treaty cannot do what the Court below sought to accomplish by resort to the United Nations Charter. As indicated above, a State law can be invalidated by the terms of a treaty. The appeal to the Charter, however, was open to criticism in this context not only because the Articles in question were not self-executing, but also because the way to render the Alien Land Law inoperative had already been pointed out and could be followed without resort to an argument founded upon the interpretation of a treaty.

An examination of the bulk of the cases arising in Federal or State courts in which there was some discussion of self-executing treaties indicates that, while it is possible to demonstrate that treaties concerned with certain types

the United Nations, 79th Congress, 1st Session, pp. 104-6. See also Kelsen, *The Law of the United Nations* (1950), pp. 22-30.

¹ (1952), 242 P. 2d 617. See, for example, *Shelley v. Kraemer* (1948), 334 U.S. 1, and *Oyama v. California* (1948), 332 U.S. 633, regarding discrimination in land ownership; *Sweatt v. Painter* (1950), 339 U.S. 629, and *Henderson v. United States* (1950), 339 U.S. 816, regarding discrimination in education and in transportation.

² At pp. 620-1.

³ At p. 621. See *Curran v. City of New York* (1947), 77 N.Y.S. 2d 206. Cf. *Balfour, Guthrie and Co. v. United States* (1950), 90 F. Supp. 831, at p. 832. See also Kelsen, *op. cit.*, pp. 336-42.

of subject-matter have come to be regarded by courts as self-executing or non-self-executing, as the case may be, any attempt to generalize, e.g. to state that all treaties affecting private rights are self-executing, or, again, that all treaties touching upon the enumerated powers of Congress are non-self-executing, will usually involve so many exceptions to the attempted rule that the effort must be of limited value. This does not mean that the courts pursue a haphazard course in their consideration of the matter, but rather that they have considerable latitude in reaching a decision with regard to an issue which has been controversial since pre-Republic days.

III

Congress, the Executive, and self-executing treaties

Disagreements between the executive and legislative branches of the Federal Government over the treaty-making power have usually involved one or both of the following issues: dissatisfaction with the agencies authorized under the Constitution to exercise the treaty-making power or concern for the protection of the constitutional distribution of powers against attempts to disregard them by way of the exercise of the treaty-making power.

Dissatisfaction with the omission of the House of Representatives from a share in the treaty-making power, which was evident at the Constitutional Convention and in several of the State ratifying-conventions, found expression in various ways. It has given rise to a number of resolutions proposing that the Constitution be amended to require that treaties be approved by both Houses of Congress.¹ With regard to the implementation of non-self-executing treaties, the House of Representatives has more than once expressed the view that it is under no obligation, legal or moral, to adopt the necessary enabling legislation.² At times, also, the House has manifested its opposition to the assumption that the President and the Senate could by treaty exercise any of the enumerated powers of Congress or commit Congress without its consent to the exercise thereof, e.g. placing

¹ See Ames, 'The Proposed Amendments to the Constitution of the United States during the First Century of Its History', *Annual Report of the American Historical Society for 1896* (1897), II; Musmanno, 'Proposed Amendments to the Constitution', United States House of Representatives, H. Doc. No. 551, 70th Congress, 2nd Session; Loeffler, *Proposed Amendments to the Constitution of the United States* (1947); Commerce Clearing House, *Congressional Index, 1943-1954*. Most of the resolutions have been proposed since January 1943.

² When President Washington expressed the view that the House of Representatives was obliged to implement certain provisions of the Jay Treaty of 1794, the House replied by resolution to the effect that it reserved its right 'to deliberate on the expediency or in expediency of carrying such Treaty into effect . . .' (*Annals of Congress*, 4th Congress, 1st Session, pp. 761, 771-2). That the action of the House on this occasion was inspired more by the politically controversial Jay Treaty than by devotion to principle is evident from the fact that enabling legislation was adopted without discussion for three other treaties which were before Congress at the same time (*ibid.*, pp. 784, 821). See also *ibid.*, 2nd Session, pp. 1763-7.

a charge on the national revenues,¹ the alteration of import duties,² the disposal of property of the United States.³ In spite of these protests on constitutional grounds, Congress has customarily implemented treaties in recognition of the international responsibility of the United States for the execution of international commitments.⁴

The fact that the terms of a treaty impinge upon the enumerated powers of Congress does not necessarily mean that it must be classified as non-self-executing. For instance, the executive branch has regarded as self-executing treaties concerned with the avoidance of double taxation of incomes and estates,⁵ diversion of water from the Niagara River,⁶ fishing and navigation rights,⁷ most-favoured-nation clauses.⁸ Treaties, however, which concern rights in industrial property have been regarded by the executive branch as non-self-executing.⁹ Upon occasion, in the absence of specific congressional implementation, an international agreement has been treated as self-executing if its terms were wide enough to permit enforcement by the executive branch or to create a rule for the courts.¹⁰ The

¹ See, for example, the discussion of the implementation of the Treaty with Russia for the Cession of Alaska: *The Congressional Globe*, 40th Congress, 2nd Session, pp. 3616, 3621, 3660. And see *supra*, p. 185, n. 3.

² See, for example, United States House of Representatives, H. Report No. 2680, 48th Congress, 2nd Session. See also Tucker, *Limitations on the Treaty-Making Power under the Constitution of the United States* (1915).

³ See, for example, United States Senate, S. Report No. 201, 78th Congress, 1st Session, pp. 6-7.

⁴ Congress failed to pass the necessary enabling legislation for the Commercial Reciprocity Convention with Mexico of 1883 (24 Stat. 975, 983). This is apparently the only such instance of failure to implement a treaty. See Stone, 'The House of Representatives and the Treaty-Making Power', in *Kentucky Law Journal*, 17 (1928-9), p. 235. Congress itself expressed strong disapproval of the failure of the French legislature to implement the provisions of the Treaty on Claims and Duties of 1831 (8 Stat. 430) (*Register of Debates in Congress*, 23rd Congress, 2nd Session, pp. 1516-17, 1531, 1633-4; *ibid.*, 24th Congress, 1st Session, p. 3594). For the reaction of the French Chamber of Deputies see *Archives parlementaires de 1787 à 1860*, 2nd series, vol. 88, pp. 111 *et passim*; *ibid.*, vol. 91, pp. 712-14; *ibid.*, vol. 92, pp. 656-83; *ibid.*, vol. 94, pp. 395 *et passim*. For a report of the controversy see Moore, *International Arbitrations* (1898), vol. v, pp. 4463 ff.

⁵ See, for example, United States Senate, Committee on Foreign Relations, *Hearings on Executives D and E, Conventions with Great Britain Respecting Income and Estate Taxes*, 79th Congress, 1st Session, p. 60.

⁶ Hackworth, *Digest of International Law* (1940-4), vol. v, pp. 175-6.

⁷ United States Department of Justice, *Official Opinions of the Attorneys General*, vol. vi, p. 750.

⁸ Hackworth, *op. cit.*, pp. 180-1. The view was expressed in the Department of Justice, however, that such a clause could not 'supersede a provision of a tariff law unless both Houses of Congress enact a statute for the purpose of giving execution to the treaty' (United States Department of State, *Foreign Relations*, 1929, vol. i, pp. 989-90).

⁹ United States Department of Justice, *Official Opinions of the Attorneys General*, vol. xix, pp. 278-9. See, for example, Rogers and Ladas, 'Are Conventions Relating to Industrial Property Self-Executing?', in *Bulletin of the United States Trade-Mark Association*, 30 (1935), p. 1.

¹⁰ See, for example, *United States v. Robbins* (1799), 27 Fed. Cas. 825; *Ex parte Toscano* (1913), 208 F. 938. In *United Shoe Machinery Co. v. Duplessis Shoe Machinery Co.* (1907), 155 F. 842, it was held that the failure of Congress to include an Article of the Additional Act of 1900 in a statute on the protection of industrial property indicated that, by implication, the Article was non-self-executing although it had previously been regarded as self-executing in terms (at p. 845).

problem of whether implementation of non-self-executing treaties is mandatory upon Congress has been avoided by the adoption of the necessary enabling legislation prior to the conclusion of the treaty.¹

Congressional criticism of the exercise of the treaty-making power has been based in part on the fear of a strong Executive who might seek to use this power to accomplish purposes which may not be in the best interests of the country. This view recurs from time to time in spite of arguments based on the legal duty of the President and of the Senate—the latter also having a distinct responsibility in the matter of treaty-making—to support the Constitution and on the absence of specific examples of misuse of the power during a century and a half of experience under the Constitution. However, a treaty may act as a catalyst for diverse tensions within Congress itself or within public opinion as expressed by Congress. Such tensions may be founded on political differences within Congress or between Congress and the President, on what has been described as isolationist attitudes towards the foreign policy of an administration, on considerations of particular commercial interests, or on efforts to preserve the powers of the States against Federal encroachment, or to protect the rights of the individual.² Some or all of these considerations have contributed to the criticism directed in the Senate and elsewhere against the Genocide Convention and against the Draft Covenant of Human Rights,³ as well as to the proposals for a restriction of the treaty-making power by constitutional amendment.⁴ These proposals, which vary in the stringency of

¹ See Reiff, 'The Enforcement of Multipartite Administrative Treaties in the United States', in *A.J.* 34 (1940), p. 661. See also United States Senate, Committee on Foreign Relations, *Hearings on Executive A, Convention with France on Double Taxation*, 80th Congress, 1st Session, p. 79.

² For example, the Senate approved the Charter of the Organization of American States of 1948 subject to the reservation that '... none of its provisions shall be considered as enlarging the powers of the Federal Government of the United States or limiting the powers of the several states of the Federal Union with respect to any matters recognized under the Constitution as being within the reserved powers of the several states' (United States Department of State, *United States Treaties and Other International Agreements*, vol. ii, Part 2, p. 2484).

³ United States Senate, Committee on Foreign Relations, *Hearings on Executive O, The Genocide Convention*, 81st Congress, 2nd Session. For comment on the Genocide Convention see, for example, Phillips, 'The Genocide Convention: Its Effect on our Legal System', in *American Bar Association Journal*, 35 (1949), p. 623; Gordon, 'Self-Executing Treaties—Genocide Convention', in *Michigan Law Review*, 48 (1950), p. 852. For comment on the Draft Covenant of Human Rights see, for example, *Cong. Rec.*, 82nd Congress, 1st Session, pp. 10129, 11509-14; *ibid.*, 82nd Congress, 2nd Session, pp. 909, 2468; Crowell, 'The Declaration of Human Rights, the United Nations Charter and Their Effect on the Domestic Law of Human Rights', in *Virginia Law Review*, 36 (1950), p. 1059.

⁴ During the past decade, seventy or more resolutions seeking to effect a change in the treaty-making power have been introduced in Congress; not all of these proposals, however, would be restrictive (see *supra*, p. 190, n. 1). The greatest controversy has arisen over two proposals by Senator John W. Bricker (S.J. Res. 130, 82nd Congress, 2nd Session, and S.J. Res. 1, 83rd Congress, 1st Session). The Committee on Peace and Law of the American Bar Association has also sponsored a project for an amendment (S.J. Res. 43, 83rd Congress, 1st Session). See also Allen, *The Treaty as an Instrument of Legislation* (1952).

their terms, provide in general that treaties which contravene the Constitution shall be deemed invalid and that Congressional or other implementation shall be necessary before a treaty may be effective as municipal law.¹ The latter point suggests a concept of treaty-making not unlike that which has developed in the United Kingdom and certain other States which have adopted the British practice in the matter. However, given the governmental structure of the United States, the results as far as the enforcement of treaties is concerned might be more reflective of the experience under the Articles of Confederation than of current British practice.

While the problem of self-executing treaties in the United States has often been clarified by judicial opinion, the political aspect—associated as it is with the larger historical and constitutional problem of the nature and scope of the treaty-making power—has loomed large in the discussion of the subject. It is possible, however, to distinguish the characteristics of self-executing treaties as being, narrowly, those which by their own terms can be carried into effect by administrative authorities or which create a rule for the courts, or, more broadly, those which can be implemented by the executive branch itself without recourse to congressional action. Self-executing treaties may comprehend matters which come within the scope of the enumerated powers of Congress as well as matters which normally are reserved to the jurisdiction of the States. The limitation of the scope of self-executing treaties depends upon interpretation by the several branches of government, but the opinion of the Supreme Court would, presumably, constitute the definitive ruling in any controversy involving the matter.

The foregoing discussion indicates that the definition of self-executing treaties, which is essentially a problem of the enforcement of treaties, is a matter to be determined by the municipal law of a given State, interpreted with due consideration of the constitutional history of the State, the organization of its government, and, indeed, of the political currents of a

¹ United States Senate, *Report of the Committee on the Judiciary on S.J. Res. 1: Senate Report No. 412*, 83rd Congress, 1st Session. The various proposals made in 1953 also include some provision for similar restriction of executive agreements. For a discussion of S.J. Res. 1, as revised by the Senate Committee on the Judiciary, see American Bar Association, Section of International and Comparative Law, *Report of the Committee on Constitutional Aspects of International Agreements*, 24 August 1953. For arguments in favour of and in opposition to the proposed amendment see United States Senate, Committee on the Judiciary, *Hearings on S.J. Res. 1 and S.J. Res. 43*, 83rd Congress, 1st Session.

The controversy over the proposed restriction of the treaty-making power has given rise to a great amount of discussion and writing. A few illustrative articles may be mentioned here: Deutsch and others, 'Should the Constitution be Amended to Limit the Treaty-Making Power?', in *Southern California Law Review*, 26 (1953), p. 347; Hatch, 'Treaty-Making Power: An Extraordinary Power Liable to Abuse', in *American Bar Association Journal*, 39 (1953), p. 808; Holman, 'Treaty Law-Making', *ibid.* 36 (1950), p. 707; Perlman, 'On Amending the Treaty-Making Power', in *Columbia Law Review*, 62 (1952), p. 825; Sutherland, 'Restricting the Treaty Power', in *Harvard Law Review*, 65 (1952), p. 305.

given period. The problem of definition is not wholly a legal one; it is also a problem of political science. The distinction between self-executing treaties and non-self-executing treaties may not be open to generalization for purposes of international law. Nevertheless, an understanding of the nature of the problem is necessary in the field of international law, because of the implications of the problem for the basic obligation of States to execute their validly concluded international agreements.

APPENDIX

It may be convenient to supplement the preceding discussion of the question of self-executing treaties in the United States by a factual survey of the position in some other countries.

France. As the Court of Appeal of Paris stated in 1948, in France 'the special authority of international treaties is more strongly affirmed now that the new Constitution has formally proclaimed it'.¹ The trend towards this 'special authority' of treaties may be found in the constitutional theory and practice of the Third Republic. Article 8 of the Constitutional Law of 16 July 1875 authorized the President to negotiate and to ratify treaties subject to the proviso that 'treaties of peace, commerce, those which place a charge on national finances, and those which relate to the personal status, and to the property rights of French nationals abroad' should receive the approval of the national Legislature prior to ratification.² Custom extended the scope of Article 8 as Governments came to seek legislative approval of 'virtually all treaties of an important character or affecting prior legislation'.³ A self-executing treaty after approval by the Legislature and ratification by the President had the force of law. Thus a self-executing treaty—and the term would also include a non-self-executing agreement which might be given effect by executive decree⁴—could create rights and duties for nationals and be applied directly by the executive or judicial authorities without legislative implementation. With regard to the rule *lex posterior derogat priori*, in practice an earlier statute in conflict with a later self-executing treaty would be 'suspended' rather than superseded; a later statute could suspend the operation of an earlier treaty but would not nullify the treaty.⁵ Although the view was advanced that a prior treaty might even prevail against a subsequent law, this view was not followed in practice and efforts were made by the courts to avoid the issue.⁶ It was doubtful, also, whether a self-executing treaty which did not come within the scope of Article 8 could have a suspensory effect

¹ *Lambert v. Jourdan*, decided on 30 January 1948: *Annual Digest*, 1948, Case No. 111, at p. 325.

² *Journal Officiel*, 18 July 1875, pp. 5489–90. The Article also provided that 'no cession, no exchange, no addition of territory can take place save by virtue of law'.

³ Preuss, 'The Relation of International Law to Internal Law in the French Constitutional System', in *A.J.* 44 (1950), p. 641, at p. 654.

⁴ See *Zumkeller v. Florence and Peillon: Annual Digest*, 1935–7, Case No. 202.

⁵ Mestre, 'Les Traités et le droit interne', in Hague Academy, *Recueil des Cours*, 38 (1931), p. 237, at pp. 253, 282, 285. See Noël, *De l'autorité des traités comparée à celle des lois* (1921), pp. 161–2.

⁶ See, for example, *Hobier v. Sigg Sandrino and Compagnie d'Assurances 'La Zurich': Annual Digest*, 1935–7, Case No. 200; *Sanchez v. Consorts Gozland: ibid.*, 1931–2, Case No. 204. See also Preuss in *A.J.* 44 (1950), pp. 659 ff.

on an earlier statute.¹ The approval of a treaty by the Chambers *prior* to ratification did not constitute implementation of the agreement, but served as an authorization to the President to proceed to ratify the agreement at his discretion. A non-self-executing treaty required enabling legislation by the Chambers or implementation by executive decree, as the case might be, before having effect as law or being capable of execution within the country.²

The Constitution of the Fourth Republic clarifies the earlier practice regarding treaties by providing:

'Article 26: Diplomatic treaties duly ratified and proclaimed shall be enforced even though they be contrary to French domestic laws, and no legislative acts, other than those necessary to ensure their ratification, shall be required for their enforcement.

'Article 27: Treaties relative to international organization, peace treaties, commercial treaties, treaties that involve national finances, treaties relative to the personal status and property rights of French citizens abroad, and those that modify French domestic laws, as well as those that call for the cession, exchange, or addition of territories, shall not become final until duly ratified by a legislative act.

'No cession, no exchange, and no addition of territory shall be valid without the consent of the populations concerned.

'Article 28: Diplomatic treaties duly ratified and proclaimed having authority superior to that of domestic legislation, their provisions shall not be abrogated, modified or suspended without previous formal denunciation through diplomatic channels. Whenever a treaty such as those mentioned in Article 27 is concerned, such denunciation must be approved by the National Assembly, except in the case of commercial treaties.'³

In accordance with earlier practice, ratification is at the discretion of the President, acting on the advice of the Cabinet. The act of approval by the National Assembly does not constitute implementation of an international agreement. While Article 27 requires legislative approval for treaties dealing with certain subjects, it is evident that any self-executing treaty having legislative approval before ratification, is effective as law.⁴

On the basis of Article 26, reiterated in Article 28, treaties, constitutionally concluded, are given 'an authority superior to that of domestic legislation'. The matter of priority as between an earlier treaty and a later statute, which was not fully resolved in the Third Republic, is now formally settled in favour of the effectiveness of the treaty. For example, the provisions of a Treaty of 1853 between France and the United States respecting 'national treatment' in the matter of property rights were held to prevail over an Ordinance of 1945 as amended by a Law enacted in 1946.⁵ International

¹ In 1926, for example, the Court of Appeal of Douai held that 'a convention promulgated by a simple decree cannot modify the law . . .' (*Six et Cie 'La Zurich' v. Opsomer*, cited by Preuss, loc. cit., p. 654, n. 41).

² See *Veuve Allimas ben Mohamed v. Sanchis et Cie 'La Zurich'*: *Annual Digest*, 1931-2, Case No. 193 and Note. Cf. *Mumm and Co. v. Société Vinicole de Champagne*: *ibid.*, 1935-7, Case No. 203.

³ French Embassy, Press and Information Division, *Constitution of the French Republic*, pp. 5-6.

⁴ Preuss, loc. cit., p. 654.

⁵ *Lambert v. Jourdan*: *Annual Digest*, 1948, Case No. 111. It may be noted that the Court of Cassation has ruled that this same legislation is not applicable to 'aliens who can invoke an international Convention exempting them from these conditions' effecting certain limitations regarding property rights (*Verbrigghe v. Bellest*: *ibid.*, 1947, Case No. 76). See also *Chonchol v.*

agreements, other than 'diplomatic treaties' or treaties concerning the subjects listed in Article 27, as well as 'informal agreements', can be ratified by the President without prior legislative approval.¹ While such agreements, if self-executing, have the force of law within France, it is not clear whether they can supersede earlier legislation in conflict with their terms.² The Constitution of 1946 gives the self-executing treaty which has prior legislative approval, full effect as law and makes it superior to municipal law enactments. The non-self-executing treaty, following implementation by the Legislature or the Executive, is similarly accepted as a source of law. Within the limits of the responsibility of the Executive to the National Assembly for the nature and scope of the international engagements concluded in the name of France, the treaty-making power of the French Government is a substantial authority.

Federal Republic of Germany. With regard to the conclusion and ratification of treaties, the Basic Law of 23 May 1949 of the Federal Republic of Germany does not depart substantially from the provisions of the Constitution of the Weimar Republic. Two categories of treaties are contemplated in Article 59 of the Basic Law: those which the President may ratify on his own authority and those which, because they 'regulate the political relations of the Federation or refer to matters of federal legislation', require the approval of the Legislature before ratification by the President.³ To this provision must be added the requirement that the *Länder* (i.e. the various constituent States) are to be consulted before the conclusion of treaties affecting their special interests.⁴

An examination of the operative status of treaties in a country raises various questions: whether the concept of self-executing treaties can be accepted; whether the rule *lex posterior derogat priori* is to be strictly applied; and, for the federal State, what relation federal treaties should bear to the laws of the component entities. In regard to these questions the terms of the Basic Law mark a substantial departure from the provisions of the Constitution of the Weimar Republic. The Basic Law provides, in Article 25:

'The general rules of international law shall form part of federal law. They shall

Dame Vita: *ibid.*, Case No. 2; *Mandel v. Vatan*: *ibid.*, 1948, Case No. 1; *Percepteur du 1^{er} Arrondissement de Paris v. Salichs*: *ibid.*, Case No. 2. The Court of Cassation held in 1948 that 'the Courts cannot invoke the provisions of French law, which lack authority in face of the precise stipulations of a treaty, for the purpose of introducing a distinction between the rights of landlord and tenant . . . which is in contradiction with the general provisions of the Treaty' (*Capello v. Marie*: *ibid.*, Case No. 112). For a general discussion of international law in national courts see Morgenstern, 'Judicial Practice and the Supremacy of International Law', in this *Year Book*, 27 (1950), p. 42.

¹ Constitution, Article 31. See Preuss, *loc. cit.*, p. 655.

² *Ibid.*

³ Germany, 1947-1949, *The Story in Documents*, Department of State Publication No. 3556 (1950), p. 283, at p. 291. Article 45 of the Weimar Constitution required the approval of the *Reichstag* for treaties of alliance or those affecting matters falling within the legislative competence of the *Reichstag* (*Reichsgesetzblatt*, 1919, ii, p. 1383, at p. 1392). The approval of the *Reichstag* simply authorized the President to ratify the treaty, but did not transform it into municipal law. See *German Railways (Most-Favoured Treatment) Case*: *Annual Digest*, 1927-8, Case No. 280; *Liquidation of German Property (Treaty of Versailles) Case*: *ibid.*, Case No. 281; *German-Polish Revaluation Convention Case*: *ibid.*, 1931-2, Case No. 196. See also Schiffer and Wilcox, 'Treaty-Making in Post-War Germany', in *A.J.* 30 (1936), p. 216; Schmitz, 'Die Methode des Abschlusses internationaler Verträge nach deutschem Recht', in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1933, Part I, p. 313.

⁴ Article 32. See Preuss, 'International Law in the Constitutions of the Länder in the American Zone in Germany', in *A.J.* 41 (1947), p. 888. Article 78 of the Weimar Constitution required the prior consent of the Länder to treaties affecting the territorial limits of the Republic.

take precedence over the laws and create rights and duties directly for the inhabitants of the federal territory.¹

Assuming that the expression 'general rules of international law' comprehends not only customary international law and the 'general principles of law recognized by civilized nations' but also conventional international law, treaties concluded in pursuance of constitutional requirements can, if self-executing, create by their own terms law which will be applied by the agencies of government and which will directly affect the citizens of the country. The issue of transformation of treaties into municipal law, which was much discussed in connexion with treaty-making under the Weimar Republic, seems to be obviated by this Article.² While Article 4 of the Weimar Constitution provided that 'the generally recognized rules of international law are binding as part of German Federal Law',³ there was no reference to the matter of precedence. In practice, the rule of supersession by the treaty or statute later in date was observed.⁴ The terms of Article 25 of the Basic Law, however, indicate that a treaty may supersede an earlier statute; furthermore, they suggest that a treaty may not itself be superseded by a later statute.⁵ The relation between federal law and laws of the *Länder* is governed by Article 31 of the Basic Law, which provides that 'federal law shall supersede *Land* law'.⁶ Pursuant to this Article, treaties, constitutionally concluded, can similarly supersede laws enacted by the *Länder*.⁷

The Netherlands. The Kingdom of The Netherlands adopted in 1953 a series of amendments to the Constitution designed to clarify and strengthen theory and practice regarding treaties and to give the Government greater latitude in undertaking international commitments.⁸ Prior to the coming into force of the amendments on 22 June

¹ *Germany, 1947-1949, The Story in Documents*, p. 286.

² For a discussion of 'transformation' of treaties into national law see Kelsen, *Principles of International Law* (1952), pp. 351 ff. 'Transformation' was assumed to be necessary in order to allow a German court to apply rules established by treaty (*Rhineland Ordinances Case: Annual Digest*, 1925-6, Case No. 7). If it could be shown that a treaty had been concluded in pursuance of an earlier treaty which had been transformed into municipal law, the later treaty did not require a specific act of transformation (*Eheleute K. v. Deutsche Reichsbahn-Gesellschaft: ibid.*, 1929-30, Case No. 226).

³ *Reichsgesetzblatt*, 1919, ii, p. 1383.

⁴ See *Foreign Exchange (Germany) Case: Annual Digest*, 1933-4, Case No. 3. Cf. *Nationality (State Succession) Case (ibid., 1948, Case No. 57)*, in which it was held with reference to the German Nationality Law of 1913 that 'the acquisition of Austrian and the loss of German nationality by the respondent follows from rules of international law, which are part of German law, and even override German legislative provisions which conflict with them'.

⁵ See Preuss, 'On Amending the Treaty-Making Power: A Comparative Study of the Problem of Self-Executing Treaties', in *Michigan Law Review*, 51 (1953), p. 1117, at p. 1133.

⁶ *Germany, 1947-1949, The Story in Documents*, p. 287.

⁷ The Constitution of the Italian Republic, promulgated on 1 January 1948, provides in Article 80 for legislative approval prior to the ratification of treaties 'which are of a political nature, which involve arbitrations or judicial regulations, or which entail changes in the national territory, financial burdens, or modifications of laws' (Peaslee, *Constitutions of Nations* (1950), vol. ii, p. 289). Article 10 provides that 'the Italian juridical system conforms to the generally recognized principles of international law' (*ibid.*, p. 280).

Practice under the Kingdom of Italy suggests that self-executing treaties had the force of law. See *De Marco v. Waren Handelsgesellschaft: Annual Digest*, 1923-4, Case No. 188. Cf. *Olivo v. Mordini, Giovanni and Others: ibid.*, 1931-2, Case No. 3. In regard to conflicts between provisions of treaties and laws or decrees, an effort was made to avoid an interpretation detrimental to the provisions of the international agreement. See *Pubblico Ministero v. Benedetti: Annual Digest*, 1946, Case No. 48. And see, in general, Sereni, *The Italian Conception of International Law* (1943).

⁸ For an analysis of the amendments see Van Panhuys, 'The Netherlands Constitution and International Law', in *A.J.* 47 (1953), p. 537.

1953, the status of treaties was governed by constitutional practice developed by different agencies of government and based upon the provisions of the former Article 60 of the Constitution. This Article contemplated two classes of international instruments: 'treaties', which contained a provision for ratification and which, in consequence, required the approval of the States-General prior to ratification by the Sovereign; and 'agreements', which lacked provision for ratification and, therefore, had only to be submitted to the States-General for their information.¹

In practice, especially on the basis of the jurisprudence of the Supreme Court, a self-executing treaty on ratification in pursuance of the provisions of Article 60 could create rights and duties for subjects and could be enforced as law by the courts or be applied by administrative agencies without legislative implementation.² A non-self-executing treaty would, of course, need implementation by the States-General before it could be enforced as law.³ Practice also supported the rule *lex posterior derogat priori*, at least with reference to the supersession by a treaty of an earlier conflicting statute, although such conflicting legislation would ordinarily have been brought into conformity with the terms of the treaty by the States-General before the agreement was ratified.⁴ The acceptance of the reverse of this situation, whereby a treaty would be superseded by a later conflicting statute, was not clearly settled in practice before the adoption of the recent amendments, the courts having apparently sought to avoid the issue rather than to rule directly upon it.⁵

The provisions of the new constitutional amendments relating to treaties depart in several respects from the earlier practice.⁶ In general, the States-General must approve all international agreements before they can be ratified or be enforced as law.⁷ Certain exceptions to this requirement of legislative consent are contemplated in order to avoid introducing any suggestion of inflexibility in the conduct of the nation's international affairs which might nullify the basic theory underlying these amendments.⁸ The approval of the States-General is not required for international agreements:

(a) if the agreement is one with respect to which this has been laid down by law;

¹ Peaslee, *op. cit.*, p. 519; *Replies from Governments to Questionnaires of the International Law Commission*, U.N. Doc. A/CN.4/19 (1950), p. 57. See Van Panhuys, *loc. cit.*, p. 548.

² The Netherlands Delegation to the United Nations has stated: 'From the jurisprudence of the Supreme Court of the Netherlands (since a judgment of June 25, 1841), it appears that a treaty concluded by the King in conformity with the provisions of the Constitution, has the force of law in the Kingdom and, consequently, becomes immediately binding, not only for the High Contracting Parties, but also—in so far as the treaty so provides—for the citizens.' U.N. Doc. A/CN.4/19 (1950), p. 58. See also *Public Prosecutor v. J.V.*: *Annual Digest*, 1931-2, Case No. 199 and footnotes thereto; *Papadopoulos of Péra v. N. V. Koninklijke Nederlandsche Stoombootmaatschappij of Amsterdam*: *ibid.*, 1927-8, Case No. 285.

³ See *Public Prosecutor v. Managing Director of N. V. Zwitsersche Waschinrichting*: *Annual Digest*, 1933-4, Case No. 220.

⁴ See *Public Prosecutor v. J.V.*: *Annual Digest*, 1931-2, Case No. 199.

⁵ In a note to *Public Prosecutor v. J.V.*, Professor J. H. W. Verzijl stated that '... the question whether in a Dutch Court a previous treaty must yield to a subsequent conflicting law, has not so far come before the Supreme Court. A definite ruling on the matter has been avoided by the finding that there was no inconsistency between statute and treaty' (at p. 355, n. 1). See *Mannheim Convention (Holland) Case*: *Annual Digest*, 1933-4, Case No. 4.

⁶ The following references to the amendments are based on an unofficial translation provided by The Netherlands Information Service.

⁷ Article 60. The agreements are tabled for 30 days in the States-General and are deemed approved at the end of that time if there is no indication to the contrary or if the States-General have not been asked to make a specific decision on an agreement (Article 60 (a)). The thirty-day rule is reminiscent of the British practice regarding the tabling of treaties for twenty-one days in the House of Commons. See McNair, *The Law of Treaties* (1938), p. 33.

⁸ Van Panhuys, *loc. cit.*, p. 545.

- (b) if the agreement is exclusively concerned with the execution of an approved agreement, provided that the States-General, when they gave their approval to the agreement, did not make a reservation in this respect;
- (c) if the agreement does not impose any considerable pecuniary obligation on the Kingdom and if it has been concluded for a period not exceeding one year;
- (d) if in exceptional cases of an urgent nature the interest of the Kingdom requires that the agreement shall enter into force without delay.¹

Exceptions (a) and (b) permit immediate enforcement of an agreement on the basis of an existing expression of legislative approval. An informal type of commercial agreement is apparently contemplated in exception (c).² It is not clear whether such an agreement can by its own force make an appropriation of money, which possibility would accord considerable authority to the terms of a self-executing agreement. Exception (d) is limited in scope by the requirement that where the interests of the country might be adversely affected by the terms of an agreement, such agreement would have to receive the subsequent approval of the States-General; failing approval, the agreement would have to be terminated.³

The authority of the Government in the conduct of foreign relations is strengthened by paragraph (c) of Article 60, which provides that, subject to the approval of the States-General, 'if the development of the international legal order requires this, the contents of an agreement may deviate from certain provisions of the Constitution'.⁴ Furthermore, by means of an international agreement, 'certain powers with respect to legislation, administration and jurisdiction may be conferred on organizations based on international law'.⁵ Where this conferment of powers might affect, for example, individual rights and guarantees as established in the Dutch Constitution, the agreement would be subject to approval by two-thirds of the members of each Chamber of the States-General. Thus the scope of this Article is not so far-reaching as might appear at first glance.⁶ The role of the Legislature in all of these amendments is confined to approving the agreements prior to ratification. Given such approval, a self-executing treaty has virtually no limit as to its scope as law in the country save the fundamental limitation inherent in the responsibility of the Government to the Legislature.

The problem of the supersession of a treaty by a later conflicting statute—a problem which was unsettled before 22 June 1953—is now resolved by the terms of Article 60 (e): 'The legal provisions in force within the Kingdom shall not apply if the application should be incompatible with agreements which have been published in accordance with Article 60 (f) either before or after the enactment of the provisions.'⁷ Thus the

¹ Article 60 (b). This paragraph is subject to the exception in paragraph (c) of Article 60.

² Van Panhuys, loc. cit., pp. 545-6.

³ Article 60 (b).

⁴ Such a situation would require a vote of approval by a two-thirds majority of each Chamber of the States-General. Van Panhuys (loc. cit., p. 551) comments, with reference to this provision: 'Though the Netherlands Government has thus always taken the view that the conferring of powers on international organizations under an international agreement is in itself not in conflict with the Constitution, nevertheless, as the number of these organizations is increasing and their powers are being extended, also taking into account the special character of the "supra-national organizations", it was deemed desirable to eliminate any doubts as to their constitutionality and to give this feature of recent development of international law the honor it deserves.' Under Article 60, the courts may not rule on the constitutionality of international agreements.

⁵ Article 60 (g).

⁶ Van Panhuys, loc. cit., pp. 551-2.

⁷ This provision is also applicable to agreements which, pursuant to the exceptions listed in Article 60 (b), have not been submitted to the approval of the States-General. See Van Panhuys, loc. cit., p. 555, n. 30.

supremacy of conventional international law over municipal law is acknowledged as a principle of Dutch constitutional law; whether a similar supremacy is also understood for customary international law or for 'the general principles of law recognized by civilized nations' remains to be seen.¹ Practice with regard to treaties pursuant to the far-reaching provisions of the recent amendments to the Constitution of The Netherlands, affecting as they do the perennial problem of the relation between international law and municipal law, will be of keen interest to students of both international law and comparative law.²

United Kingdom. In the United Kingdom, the making of treaties is a prerogative of the Crown, and in strict constitutional theory Parliament has no share in the process of conclusion or ratification. While generally treaties affecting private rights require legislation before they can be enforced by the courts, this is not so with regard to treaties concerned with the conduct of war or the making of peace.³ A Government would as a rule seek parliamentary approval, prior to their ratification, of treaties requiring legislation. However, this is so 'as a political necessity but not as a legal necessity'.⁴ As a broad rule, legislation is required with respect to treaties affecting finances,⁵ private rights,⁶ commercial matters,⁷ those altering municipal law, or establishing a rule for administrative or judicial authorities.⁸ Such parliamentary assent will include enabling legislation or the assurance thereof or the adjustment of conflicting statutes to the terms of the treaty so that the treaty can be enforced as municipal law after ratification; failing the assent of Parliament, a treaty will not be ratified by the Crown.⁹ It follows, then, that British practice obviates any real concern with the distinction between self-executing and non-self-executing treaties because there is little danger of a Govern-

¹ Van Panhuys is inclined to the view that this paragraph covers *all* international law (loc. cit., pp. 554-5, 557).

² It should be noted that as from 5 June 1953 the Constitution of Denmark was amended to provide, *inter alia*, that the prior consent of the *Folketing* is required for any proposals for changes in the territorial limits of the Kingdom and for any international agreement the terms of which engage action on the part of the *Folketing*. This latter provision would prevent the development of a situation in which, in order to enable the country to fulfil its international obligations, the Legislature would be morally committed to implement a non-self-executing treaty the terms of which it has not approved. It may be added that, pursuant to these same constitutional amendments, Denmark is permitted to concede sovereign rights if necessary to the nation's full participation in international activities. This provision, however, is subject to the requirement of approval by five-sixths of the *Folketing* or by a simple majority of the *Folketing* with subsequent approval by a plebiscite. See Eriksen, 'Denmark's New Constitution', in *Danish Foreign Office Journal*, No. 8 (1953), pp. 3-4.

³ McNair, op. cit., pp. 18-19. See *The Dirigo*, [1919] P. 204.

⁴ International Law Commission, *Report on the Law of Treaties* (1953), p. 169, n. 2. Treaties of cession are customarily submitted to Parliament for approval although some question has been raised as to the necessity for such action. See McNair, op. cit., pp. 24-26; Anson, *The Law and Custom of the Constitution* (4th ed., 1935), vol. ii, Part 2, pp. 137, 139. Cf. *Damodhar Gordhan v. Deoram Kanji* (1876), L.R. 1 App. Cas. 332.

⁵ McNair, op. cit., pp. 22-24.

⁶ See *The Parlement Belge* (1879), 4 P.D. 129, at pp. 154-5. This decision was later reversed, but the discussion regarding treaties 'remains unchallenged': McNair, op. cit., p. 14. See also *Walker v. Baird*, [1892] A.C. 491, at p. 497.

⁷ McNair, 'The Effects of Peace Treaties upon Private Rights', in *Cambridge Law Journal*, 7 (1939-41), pp. 394-5. See *Stoeck v. Public Trustee*, [1921] 2 Ch. 67, at pp. 70-71.

⁸ McNair, op. cit., pp. 13-18. See *Administrator of German Property v. Knoop*, [1933] Ch. 439. See also the section on Decisions of English Courts . . . Involving Questions of Public or Private International Law, in this *Year Book*, 27 (1950), pp. 462-3 (Enforcement of International Agreements in English Courts).

⁹ McNair, op. cit., pp. 7-8; International Law Commission, *Report on the Law of Treaties* (1953), p. 169, n. 2.

ment engaging in international commitments which cannot be executed after ratification for want of implementation by a Parliament which is not in favour of the commitment. Difficulties arising from a conflict in terms between a treaty and a statute are avoided by parliamentary modification of the statute prior to ratification of the treaty or by judicial interpretation in the case of a statute later in date than the treaty.¹

Canada. Canadian practice regarding the status of treaties as law is similar to that in the United Kingdom. Parliamentary approval and, where necessary, enabling legislation will be sought prior to the ratification of a treaty as a matter of sound political practice.² Legislative implementation would obviously be necessary for treaties involving financial commitments. The Supreme Court of Canada has held, furthermore, that a treaty cannot alter municipal law *ex proprio vigore*, nor create private rights enforceable by courts in the absence of parliamentary enabling legislation.³ The extent of the power of the Dominion to enforce treaties in derogation of provincial power has been the subject of much controversy following the decision of the Judicial Committee of the Privy Council in *Attorney-General for Canada v. Attorney-General for Ontario*.⁴ The British North America Act makes an elaborate division of powers between the Dominion and provincial governments, and includes a broad reserve clause.⁵ With regard to treaties, the Act provides that 'the Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries arising under Treaties between the Empire and such Foreign Countries'.⁶ When, however, the Dominion sought to implement certain conventions sponsored by the International Labour Organization, it was objected that the subject-matter of the conventions fell within the domain of provincial powers and that the adoption of such enabling legislation by the Dominion Parliament was *ultra vires* of its authority. This view was upheld by the Privy Council, which ruled, in part, that in a federal State 'the obligations imposed by treaty may have to be performed, if at all, by several Legislatures; and 'the executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible, but possibly of several Parliaments to whom they stand in no direct relation'.⁷ For Canada as a Federal State, this decision seriously handicaps the Dominion Government's conduct of foreign affairs.⁸

¹ Briery states that '... it is believed that there is no case in the English reports in which a court has felt bound by a statute to override a rule of international law' (*The Law of Nations* (4th ed., 1949), p. 80).

² The late Prime Minister, Mr. Mackenzie King, stated on this point: '... I submit that the day has passed when any government or executive should feel that they should take it upon themselves without the approval of parliament, to commit a country to obligations involving any considerable financial outlays or active undertakings. In all cases where obligations of such a character are being assumed internationally, parliament itself should be assured of having the full right of approving what is done before binding commitments are made. I would not confine parliamentary approval only to those matters which involve military sanctions and the like. I feel parliamentary approval should apply where there are involved matters of large expenditure or political considerations of a far-reaching character.' *Debates of the House of Commons of Canada*, 1928, ii, p. 1974, cited in the reply of the Department of External Affairs of 17 January 1950 to the questionnaire of the International Law Commission, U.N. Doc. A/CN.4/19, at p. 24.

³ *Re Arrow River and Tributaries Slide and Boom Co., Ltd.*, (1952) 2 D.L.R. 250, at p. 260.

⁴ [1937] A.C. 326.

⁵ Articles 91 and 92. See Peaslee, *op. cit.*, vol. i, pp. 335-7.

⁶ Article 132. See Peaslee, *op. cit.*, vol. i, p. 342.

⁷ [1937] A.C. 326, at p. 348. The power of the Dominion Government in pursuance of Article 132 had been previously upheld in the courts. See, for example, *Attorney-General for British Columbia v. Attorney-General for Ontario*, (1923) 4 D.L.R. 698; *The King v. Stuart*, (1925) 1 D.L.R. 12; *Re Regulation and Control of Radio Communications*, [1932] A.C. 304.

⁸ With reference to this problem Scott states: '... after 1937 the treaty-enforcing power in

Australia. Australia also accepts the practice followed in the United Kingdom and Canada of securing parliamentary approval of treaties, and, where a treaty would alter existing law or affect directly individual rights, of implementation of treaties before ratification, so that all treaties are, in effect, self-executing.¹ With regard to the question whether Australia as a Federal State has been confronted with Canada's problem of conflict between Dominion and Provincial powers in regard to implementation of treaties by the Dominion Government, the Australian Constitution does not contain a provision respecting treaties like that of Article 132 of the British North America Act. The constitutional provision authorizing the commonwealth Parliament to legislate with respect to external affairs, however, is interpreted so as to include the execution of treaties.²

India. The Indian Constitution of 1950 places the conduct of foreign relations and the negotiation and implementation of treaties among the exclusive powers of the Federal Government.³ Treaties require the approval of Parliament in order to be effective as law.⁴ In pursuance of Article 73 (1) (b), which states that 'subject to the pro-

Canada was decentralized and Ottawa was deprived of a power held effectively for seventy years. A major constitutional limitation in international affairs was imposed upon the Canadian nation in the very decade in which she finally achieved full national status. No other federal state in the world is so restricted, and in an age desperately seeking new bases for international co-operation such national weaknesses become something more than domestic problems.' ('Centralization and Decentralization in Canadian Federalism', in *Canadian Bar Review*, 29 (1951), p. 1095, at p. 1114, quoted by Preuss in *Michigan Law Review*, 51 (1953), p. 1135. See also Scott, 'The Privy Council and Mr. Bennett's "New Deal" Legislation', in *Canadian Journal of Economics and Political Science*, 3 (1937), p. 234; MacKenzie, 'Canada: The Treaty Making Power', in this *Year Book*, 18 (1937), p. 172; Jennings, 'Dominion Legislation and Treaties', in *Canadian Bar Review*, 15 (1937), p. 455.)

The decision suggests the possibility of a situation reminiscent of that which prevailed in the United States of America under the Articles of Confederation and which was a major factor contributing to the movement for constitutional reform in 1787. Dissatisfaction, however, with the nature of the treaty-making power as drafted in 1787 is evident in the several proposals for limitations of the power by constitutional amendment which are currently before the United States Senate.

¹ See Bailey, 'Australia and the International Labour Conventions', in *International Labour Review*, 54 (1946), p. 285, at pp. 296-7. A similar practice is apparently followed in New Zealand: see *Hoani te Heuheu Tukino v. Aotea District Maori Land Board*, [1941] A.C. 308.

² Article 51 (xxix): see Peaslee, vol. i, p. 93, at p. 100. See also Article 109: *ibid.*, p. 111. Bailey ('Australia, Federal States in External Relations', in this *Year Book*, 18 (1937), p. 175) states that '... for ordinary purposes of international intercourse it may now be assumed that the Commonwealth of Australia has full power to execute in Australia, by its own legislative action, any treaty entered into with other countries' (at p. 176). See also *The King v. Burgess; Ex parte Henry: Annual Digest*, 1935-7, Case No. 19, esp. pp. 58 ff., for a discussion of the scope of the treaty-making power in the Commonwealth.

³ Seventh Schedule (Article 246), List I—Union List, items 10-19, 21; Government of India, *The Constitution of India* (1949), pp. 236-7. 'The powers of the President in relation to these matters of foreign relations are not specifically mentioned in the constitution, but since the entire executive power of the union is vested in him, they are his by implication' (Sharma, *The Government of the Indian Republic* (1951), p. 111).

⁴ Gledhill, *The Republic of India. The Development of its Laws and Constitution* (1951), pp. 104-5. With reference to an extradition treaty of the former State of Dholpur which had been challenged as not being operative by force of its own terms, the High Court of Rajasthan declared: 'Treaties which are part of international law do not form part of the law of the land unless expressly made so by the legislative authority' (*Birma v. The State* (1951), A.I.R. (38) Raj. 127, cited by Alexander, 'International Law in India', in *International and Comparative Law Quarterly*, 1 (1952), p. 289, at p. 295). Alexander maintains that the opinion of the High Court as a whole does not support this statement but rather the narrower position that treaties which affect private rights require legislative implementation. He concludes that 'Indian judges adopt English concepts of public and private international law as introduced in India under British rule' (at p. 299).

visions of this Constitution, the executive power of the Union shall extend . . . (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement',¹ the scope of the treaty-making power of the Union appears to be very broad. Given the provisions of Article 253,² the Union can make and execute treaties affecting even those matters which fall within the domain of exclusive powers of the States.³ Treaties which have received the prior approval of Parliament and which have been implemented before ratification by Parliament, where necessary, have full authority as law in India. As far as possible the laws are to be interpreted so as not to conflict with rules of international law.⁴

Israel. As the successor to the Palestine Mandate, Israel has continued the British practice regarding treaties which was followed under the Mandate. The Ministry for Foreign Affairs stated in 1950 that

'In accordance with British constitutional theory . . . it can be said that the terms of an international treaty did not, by the mere fact of ratification of the treaty or its coming into force, become part of the internal law of the country, save to the extent that its terms were actually incorporated into municipal legislation. During the period of the Mandate, the Administration and the municipal courts of Palestine acted in accordance with this doctrine, and, . . . in the absence of any new legislation regulating the subject, the Government of Israel has continued to act upon it.'⁵

Mexico. In Mexico, treaties are made by the President subject to the approval of the

Preuss (in *Michigan Law Review*, 51 (1953), p. 1123, n. 15) suggests that *Birma v. The State* may be added to *Re Arrow River and Tributaries Slide and Boom Co., Ltd.*, (1932) 2 D.L.R. 250, as a second rare example among British or Commonwealth cases in which a treaty was not enforced for want of legislative implementation.

¹ Government of India, *The Constitution of India* (1949), p. 30.

² Article 253 reads as follows: 'Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body' (Government of India, *op. cit.*, p. 119).

³ Gledhill, *op. cit.*, p. 82, states: 'In India, Parliament's powers to implement international agreements are not so trammelled [as Canada's], and there seems no reason why State obstinacy should not be overcome by the device of entering into an international agreement so as to empower Parliament to legislate on a matter on which a State is exclusively competent, but unwilling to legislate.' See Sharma, *op. cit.*, pp. 84-85; Shukla, *The Constitution of India* (1950), p. 241.

According to Article 131 (i) and (ii) of the Constitution, the jurisdiction of the Supreme Court specifically does not extend to cases involving Part B States arising out of treaties and other agreements preceding the Constitution of 1950 or specifically excluding the jurisdiction of the Court (Government of India, *op. cit.*, p. 59).

⁴ See *Mohammad Mohy-ud-Din v. The King Emperor: Annual Digest*, 1946, Case No. 40.

In replying to the International Law Commission's request for information regarding, *inter alia*, the law of treaties, the Permanent Delegation to the United Nations of the Union of South Africa stated that 'the Union Law Advisers are not aware of any laws, decrees or judicial decisions in South Africa which deal with the subjects mentioned in the . . . inquiry' (U.N. Doc. A/CN.4/19 (1950), p. 67).

⁵ Reply of 24 January 1950 to the questionnaire of the International Law Commission (U.N. Doc. A/CN.4/19 (1950), p. 37). In *Jamal Effendi Hussein v. Government of Palestine* (1950), 1 P.L.R. 50, it was held that 'the terms of the Mandate are enforceable in the Courts only as far as they are incorporated by the Palestine Order-in-Council, 1922, or any amendment thereof. . . . In so far as the Mandate is not incorporated into the law of Palestine by Order-in-Council, its provisions have only the force of treaty obligations and cannot be enforced by the Courts': cited in Reply to the questionnaire of the International Law Commission, *loc. cit.*, p. 42. See also *Sheriff Es Shanti v. Attorney-General for Palestine: Annual Digest*, 1935-7, Case No. 31; *Rozenblatt v. Registrar of Lands, Haifa: ibid.*, 1947, Case No. 11, at p. 32.

Senate.¹ There are two specific limitations on the treaty-making power: treaties may not provide for the extradition of political offenders or fugitive slaves nor affect individual rights and guarantees affirmed in the Constitution.² The relationship between treaties and the Constitution in terms of municipal law has been the subject of some discussion in Mexico. In 1926, for example, the Supreme Court held that 'the guarantee established by Article 16 of the Constitution may be limited or restricted by the stipulations of a Treaty'.³ To remove any doubt concerning the hierarchical status of the Constitution in relation to treaties, Article 133 was amended in 1934 to include the phrase 'treaties . . . made in accordance with the same', so that Article 133 now provides that 'this Constitution, the laws of the Congress of the Union that emanate from it and all the treaties that have been made and shall be made in accordance with the same . . . shall be the supreme law of the whole Union'.⁴ The courts, however, will customarily make an effort to avoid any interpretation which might suggest a conflict in terms between a treaty and the Constitution.⁵ The Constitution, federal laws, and treaties are binding upon the States and may supersede the Constitutions and laws of the States.⁶ Treaties and federal statutes are 'equivalent' as law, the later in date superseding the earlier.⁷ Self-executing treaties are binding *ex proprio vigore* on administrative and judicial authorities; non-self-executing treaties, which include those involving appropriations, cessions of territory, or, in general, affecting matters which are included among the exclusive powers of Congress, require enabling legislation in order to be effective as law.⁸

The execution of treaty obligations is a matter of concern in international law and municipal law for the obvious reason that failure to execute them constitutes an international wrong. The *manner* of execution is a matter of concern only in the sphere of

¹ Constitution, Article 89, s. 10, and Article 76, s. 1. See Peaslee, *op. cit.*, vol. ii, pp. 443, 439.

² Article 15: *ibid.*, p. 418.

³ *Re Raja*: 19 *Semanario Judicial*, Part 2, p. 1163. Article 16 concerns procedural guarantees of individual liberty. See Peaslee, *op. cit.*, vol. ii, p. 418.

⁴ Peaslee, *op. cit.*, vol. ii, p. 459. The antecedent of this provision appears to be Article 6, para. 2, of the United States Constitution: see Valdés Villarreal, 'Comentario a una Reforma del Artículo 133 Constitucional', in *Jus*, 15 (1945), No. 89, p. 441. The confusion which seems to have existed with regard to the matter of hierarchy in Article 133 was due in part, according to one commentator, '... al laconismo anglosajón del texto primitivo del artículo 133 . . .' (Rabasa, *El Derecho Angloamericano. Estudio Expositivo y Comparado del 'Common Law'* (1944), p. 541). For a critical analysis of the subject see Martínez Báez, 'La Constitución y los Tratados Internacionales', in *Revista de la Escuela Nacional de Jurisprudencia*, 8 (1946), No. 30, p. 167. The scope of the treaty-making power with particular reference to the matter of alienation of the national domain was the subject of much discussion in connexion with the conclusion in 1944 of the Treaty with the United States of America regarding International Waters. See 'Cuatro Estudios sobre el Tratado Mexicano-Norteamericano sobre Aguas Internacionales', *ibid.* See also *Re Vera*: *Boletín de Información Judicial*, 4 (1948), No. 35, p. 239.

It may be noted that pursuant to the Arbitral Award under the terms of the 1909 Agreement between Mexico and France, the Constitution was amended in 1934 to delete from Article 42 the former reference to the Isla de la Pasión (Clipperton Island) as being included in the national territory. See Andrade, *Constitución Política Mexicana con Reformas y Adiciones al Día* (1948).

⁵ See *Re Hernández del Valle* (1949), *Semanario Judicial*, vol. 100, Part 2, p. 890; *Re Valenzuela* (1950), *ibid.*, vol. 103, Part 2, p. 297.

⁶ Article 133: see Peaslee, *op. cit.*, vol. ii, p. 459. The Mexican States are forbidden to conclude treaties: see Article 117 of the Constitution: *ibid.*, p. 452.

⁷ Lanz Duret, *Derecho Constitucional Mexicano* (4th ed., 1947), p. 262.

⁸ *Ibid.* See Gutiérrez Zorrilla, *El Derecho Internacional y sus Relaciones con el Derecho Interno* (1948), pp. 82-99. See also 'Aplicación de un Convenio Internacional a la Solución de un Litigio Planteado dentro del Marco del Derecho Interno' [*Re Sabalo Transportation Co., S.A.*], in *Revista Mexicana de Derecho Público*, 1 (1946), No. 2, p. 235.

municipal law. As the preceding examination of the practice of a few States indicates, there is considerable variation regarding the legal effects which self-executing treaties can have *ex proprio vigore* by way of creating rights or duties for individuals or rules for executive or judicial organs of government. There is, however, a fairly uniform practice of submitting treaties to the national Legislature for express or tacit approval prior to ratification. Following this procedure, self-executing treaties have the force of law. In British practice, enabling legislation will be adopted before ratification, thus making all treaties 'self-executing'. In such Federal States as India, Australia, the Federal Republic of Germany, and Mexico, treaties supersede the laws of the component units. In Canada, however, the treaty-making power is limited in scope of action by the requirement that treaties concerned with subject-matter reserved to the Provinces can be implemented only by the Provinces.

In analysing the practice of these several States, however, there must be borne in mind an important institutional consideration. With the exception of Mexico, these States have some form of parliamentary system of government. Accordingly, the interrelation between Executive and Legislature, or the 'responsibility' of the Executive to the Legislature, militates against the development of controversies between them as to differences between and the scope of self-executing and non-self-executing treaties.

THE LIMITS OF THE OPERATION OF THE LAW OF WAR¹

By PROFESSOR H. LAUTERPACHT, Q.C., LL.D., F.B.A.

I

General considerations

THE object of this article is to examine the question of the limits of the operation of the rules of war by reference to what, for the sake of convenience, may be described as an illegal war, i.e. a war of aggression undertaken by one belligerent side in violation of a basic international obligation prohibiting recourse to war as an instrument of national policy.² There has been a tendency to simplify, by way of a somewhat broad generalization, the complicated nature of the issues involved in that question. That simplification has been brought about by the assumption that, in a war which is illegal on one belligerent side, the hostilities conducted by the other side must as a matter of course take the form of collective international action designed to suppress aggression. It has been assumed that an illegal war thus conceived will normally evoke an authoritative determination of aggression and corresponding international action for the collective enforcement of the peace. In pursuance of that chain of reasoning it has been repeatedly suggested that, in hostilities of that description, there is no room for the operation of the traditional rules of war and that the proper task of governments and lawyers in this sphere is the elaboration of rules, totally different in nature, governing international police action.³ Others have advanced the opinion that, in that contingency, the accepted rules of war operate only at the option of the States resisting aggression; that such States may modify them at will; and that the aggressor State or States cannot derive from their initial illegality any legal rights, including the rights usually associated with the conduct of war.⁴

It will be submitted in the present article that this approach to the subject is open to question in principle and that it over-simplifies the situations likely to arise having regard to the existing provisions of the Charter of

¹ The present article has grown out of an essay entitled 'Rules of Warfare in an Unlawful War' and published in 1953 in *Law and Politics in the World Community*, a collection of essays in honour of Professor Hans Kelsen. While substantial parts of that essay are here reproduced in a modified form, the writer has in several respects revised his views and considerably amplified their exposition in the light of practice and further reflection.

² It is an interesting question, as a matter of theory, whether two belligerent sides may be engaged in a war which is illegal on both parts and what is in such cases the legal position in relation to the subject under discussion. However, it is advisable not to complicate further the main issue by an examination of that aspect of the question.

³ See, for example, Jessup, *A Modern Law of Nations* (1948), pp. 188 ff.

⁴ See below, p. 242.

the United Nations. It is an approach which views as typical a legal state of affairs which in all probability must remain exceptional. For when we speak of an illegal war of aggression we must visualize at least three sets of situations: (1) The hostilities may take the form of collective action against the law-breaker following upon a valid determination, in accordance with the Charter of the United Nations, that there has taken place aggression in violation of the Charter. It is that situation which must be regarded as exceptional. (2) Secondly, in the absence of such determination, the ensuing hostilities may take the form of collective action of a sort—backed by the overwhelming consensus of opinion as to who in fact is the aggressor. This would have been the situation in relation to the hostilities in Korea in the years 1950–3 but for the fact (which, once more, must be considered as exceptional) that the abstention of Soviet Russia from the deliberations of the Security Council at a crucial juncture made possible decisions of that body taken by all the votes of the permanent members ‘present and voting’, thus rendering possible action which, in some ways, approximated to that covered by the first contingency outlined above. The same applies to the situation arising from collective action undertaken in pursuance of a recommendation, which is not binding, of the General Assembly made in pursuance of the ‘Uniting for Peace’ Resolution adopted by it in 1950¹—a Resolution the legal nature and effect of which are controversial.² There is no warrant in the Charter for considering the designation of the aggressor by virtue of a Resolution of the General Assembly, and the resulting illegality of the war on his part, as legally binding upon States which have not voted for the Resolution. It is doubtful therefore whether there exists in such cases a fully valid finding of the existence of an ‘illegal’ war with such, controversial, consequences as may follow therefrom. (3) Finally, situations may arise where there has been no collective determination of aggression in any shape or form, but where there is a conviction on the part of some States that one belligerent party is the aggressor and that it is waging an illegal war. That conviction may be held by both belligerent sides, mutually charging one another with being guilty of aggression. States outside the conflict may be equally so divided in their assessment of the legal merits of the struggle.

It is submitted that, probably, the situations outlined under (2) and (3) must be regarded as typical, and that any discussion of the effects of the illegality of the war as it results from the first possibility partakes of a distinct measure of unreality. For in cases in which the Security Council

¹ Doc. A/1481.

² That Resolution—which is probably not binding and which envisages recommendations which are not binding—is not, for that very reason, inconsistent with the provisions of the Charter conferring upon the Security Council the general responsibility for maintaining international peace and security.

has agreed, with the concurrence—active or passive—of all its permanent members, on a finding that a State has embarked upon war in violation of the law, the impact of such a finding will foreshadow a probability of collective action of such overwhelming magnitude and efficacy as to bring about a rapid, if not instantaneous, liquidation of the conflict. There will be no continuation of an illegal war in such circumstances. It is against this background that we must assess the relevance of the considerations, some of which are of compelling cogency, bearing upon the subject here discussed.

The first of these considerations is that any re-examination of the law of war must, if it is to avoid the justifiable reproach of being obsolete, take into account the fact that, as the result of some general international treaties of a legislative character adopted after the First and Second World Wars, the place of war in the system of international law has undergone a fundamental change. This is so for the reason that, in consequence of the successive renunciation and prohibition of war in such instruments as the Covenant of the League of Nations and, in particular, the Pact of Paris and the Charter of the United Nations, war has ceased to be a right which sovereign States are entitled to exercise at their unfettered discretion. War undertaken in violation of these enactments is an unlawful and criminal—and not only an immoral—act. The true nature of that change has been obscured, in the popular estimation, by the repeated violations of these undertakings in the past and the widely felt danger of their being disregarded in the future. However, for the lawyer this circumstance—although in some ways relevant—cannot be decisive.

The second consideration of a general character is that the results of that change in the position of war in the international legal system need not, in order to become legally cognizable and effective, be embodied in express international agreements incorporating the changes consequential upon the major development. *Cessante ratione cessat lex ipsa* is a maxim which is of general application. In the sphere of municipal law, where the machinery of legislation is efficient and readily available, there is no frequent occasion to rely on that maxim for the purpose of drawing the necessary consequences from changes expressly enacted. The 'consequential changes' are, as a rule, provided for in the very statute which has brought about the major reform. Skilled parliamentary draftsmen, well acquainted with the entire field of law, see to it that the consequential developments are not left to the hazards of advocacy or, for that matter, to judicial inventiveness and logic. In the realm of international legislation no such detailed provision for the resulting changes is feasible. The difficulties of securing agreement on the major enactment as a rule tax to the full the resources of the international conference and of the negotiators. To try to secure unanimous agreement

on the multifarious and complicated alterations of the law resulting from the principal treaty might well wreck the contemplated principal change. And yet, once a treaty has been adopted which is of a fundamental and comprehensive character, it is difficult—and probably unscientific—to act on the view that it settles only that part of the law to which it expressly refers and nothing else. A treaty is not concluded in a legal vacuum. It is part of a legal system which, for that very reason, cannot contain rules which are contradictory.¹ Any such contradiction must be removed by a reasonable application of the principle that newly enacted law, if it is of a general and fundamental character, alters rules inconsistent therewith. Admittedly, that indirect method of effecting—or ascertaining—changes in the law is unsatisfactory for various reasons. It introduces into the law an element of uncertainty and conjecture. It appears to make the law flow not from the express will of States, but from deductions made by judges or writers. As such it is open to the objection that if Governments really desire to change the law in any particular respect they ought to say so explicitly, and that unless they do so they must be deemed not to have desired the change in question.²

However, there is a limit to which we may assume—or ascribe to Governments—the desire to will things which are incompatible and contradictory. That limit in turn must curb any excessive rigidity of the positivist method. Even if we assent to the dogma that the will of States is the only source of international law, that does not mean that their will must be express and specific in every detail. The manner in which some writers have denied that the undoubted illegality of aggressive war also implies its criminality—on the part both of the State as such and the individuals responsible for its conduct—has revealed the sterility of an approach which renders impossible the adaptation of specific rules and principles to major changes in the law expressly enacted.³ Such an approach lends itself to criticism

¹ For an application of this principle to treaties inconsistent with previous treaties concluded by one of the contracting parties see this *Year Book*, 17 (1936), pp. 54–65.

² The writer of the present article formulated these objections with what is probably an excess of emphasis in the paper printed in *Transactions of the Grotius Society*, 20 (1934), pp. 178–202. There he maintained the view that, in the absence of express provisions to that effect in the Pact of Paris, it is not permissible to infer from that instrument any changes in the traditional law of neutrality. For a modification of this view see the writer's edition of Oppenheim's *International Law*, vol. ii (6th revised ed., 1944), § 292 *h*.

³ This is so in particular in cases in which the principle—such as the criminal responsibility of States or the absence of direct individual criminal responsibility in the realm of international law—alleged to be affected by the major change is in itself controversial. For this reason the relevant passage in the Judgment of the International Military Tribunal at Nuremberg for the trial of Major War Criminals, although its phraseology may be open to question on some points, constitutes an abiding contribution not only to the particular issue of criminality of aggressive war, but also to the question of the sources of international law. It is useful to cite here that passage of the Judgment:

'But it is argued that the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the

even more pertinent than that traditionally levelled against what is described as the mere jurisprudence of concepts (*Begriffsjurisprudenz*). For the latter pays attention—in fact, this is the essence of its method—to extracting all possible logical effectiveness from notions and rules forming part of positive law. Its defect lies in excessive concentration on that particular method of interpreting the law in disregard of wider considerations which may reasonably be considered to underlie the will of the legislator.

The above considerations would seem to apply directly to the question which forms the subject-matter of the present article. How far has the change in the place of war in the international legal system, i.e. its renunciation and prohibition as an instrument of national policy, affected the continued operation of the accepted rules of war and neutrality? Prior to the Covenant of the League of Nations, the General Treaty for the Renunciation of War, and the Charter of the United Nations it was generally believed that the question of the so-called justice or legality of a war was not in any way relevant to the question of the applicability of rules of warfare. In a distinct sense, that question did not arise at all. For under the law then in force every war was, legally, just; every war was legal. War was authorized not only as an instrument for enforcing existing rights. It was also permitted as a means for challenging the existing law—including the law as expressed in a particular treaty limiting the right of a State to go to war, e.g. a treaty of neutrality. The changes in international law expressed in the above-mentioned instruments have made it necessary to reconsider the relevance of the legality of war to the application of rules of warfare.

There has been a tendency to maintain that these changes have not affected the validity of the view, previously held with virtual unanimity,¹ that the rules of war apply also in an illegal war.² That tendency has been

laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offences against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. . . . In interpreting the words of the Pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.' (*American Journal of International Law*, 41 (1947), pp. 218–19.)

¹ This view, and the main reason underlying it, were clearly expressed in 1874 by Bluntschli in the second edition of his *Das moderne Kriegsrecht der zivilisierten Staaten*. He said: 'The law of war civilises on a fully equal footing both the legal and illegal war. It is only because it ignores that distinction that it is in the position to secure its general application' (at p. 519).

² See, for example, Oppenheim, *International Law*, vol. ii (6th revised ed. by Lauterpacht,

represented with special emphasis by those who have uttered warnings against the neglect, in reliance upon the new developments, of the study and the formulation of rules of war.¹ Neither, as will be seen, have municipal courts shown any pronounced inclination to take into account the impact of that major change in the legal position of war. There may exist good legal reasons for their having failed to do so. These reasons may suggest that the considerations adduced above reflect only one aspect of the legal situation.

Undoubtedly, while we are not entitled to leave out of account the legal consequences of the most important of all changes which have taken place in the international legal system, the existing imperfections of the law in the matter of determining whether there has occurred a breach of the obligation not to have recourse to aggressive war are themselves part of the law. This means that, even apart from any considerations of a practical and humanitarian nature which form the main part of the submissions which follow, there are limits to legal logic in a situation in which the law makes the ascertainment of the decisive factor dependent on a unanimous verdict of the Great Powers represented on the Security Council. In the absence of such a verdict, a war, apparently illegal on one side, which organized international society has permitted—or has been compelled to permit—to develop into a condition of prolonged hostilities not only signifies a breakdown of the international legal system as at present constituted. It also reveals a fundamental deficiency in the legal sanction of the prohibition of illegal recourse to force. That deficiency sets a limit to the operation of legal logic in relation to the consequences of the illegality of the war.

The general considerations here outlined are conflicting to the point of being unhelpful. Yet they are probably useful for the comprehension of the various aspects of a problem which is to a large extent jurisprudential in nature.

II

The illegality of the war and the operation of rules of warfare pendente bello

1. *The effects, in the humanitarian sphere, of differential application of the law between belligerents.* It would seem logical and fully consistent with 1944), § 61. See, however, §§ 63 and 64 of the same edition, where it is stated that 'for many legal purposes it seems now possible to distinguish between just and unjust (or lawful and unlawful) wars'. And see, more emphatically, for a modification of the previous view, § 61 of the 7th edition (1952).

¹ See, in particular, de La Pradelle in *Revue de droit international*, 12 (1933), pp. 511-22, and Kunz in *Revue générale de droit international public*, 41 (1934), pp. 43-52, and in *American Journal of International Law*, 45 (1950), pp. 37-61. See also Mosler in *Jahrbuch für internationales und ausländisches öffentliches Recht*, ii-iii (1948), pp. 333-57.

principle that, in so far as war conceived as an instrument of policy has ceased to be a right authorized by international law, an illegal war, i.e. a war resorted to contrary to the fundamental obligations accepted by a State, should no longer confer upon the guilty belligerent all the rights to which he was entitled under traditional international law. *Ex injuria jus non oritur* is a well-established principle of law. However, to state that principle in relation to an illegal war is to state only part of the problem. In a defective system of law—and international law is still a defective legal system in the vital aspects of creation, ascertainment, and enforcement of the law—the maxim *ex injuria jus non oritur* often yields to the rival principle, *ex factis jus oritur*.¹ Of this, the vicissitudes of the doctrine of non-recognition—which consists essentially in the application of the principle *ex injuria jus non oritur*—provide an instructive example. In a different sphere, the exercise by the municipal courts of some countries of jurisdiction over persons and vessels brought before them in violation of international law² affords yet another instance of the limitations, in the international sphere, of the rule *ex injuria jus non oritur*.

In relation to the applicability of rules of warfare to the belligerent engaging in an unlawful war rigid reliance on that principle would mean in practice that rules of war do not apply at all in a war of this nature. For, unless the aggressor has been defeated from the very outset (in which case *cadit quaestio*), it is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from rules of warfare without being bound by them.³ Accordingly, any application to the actual conduct of war of the principle *ex injuria jus non oritur* would transform the contest into a struggle which may be subject to no regulation at all. The result would be the abandonment of most rules of warfare, including those which are of a humanitarian character. These rules have been generally observed in the past. It does not matter in this context that they have been so observed mainly for the reason that they did not seriously interfere with the achievement of the major purpose of the war. The decisive fact is that they have served to a considerable extent the purpose of preventing or diminishing human suffering, and that they would in fact cease to operate if their operation were made dependent upon the legality of the war on the part of one belligerent or group of belligerents. Unless hostilities are to degenerate into a savage contest of physical forces freed from all restraints of compassion, chivalry, and respect for the dignity of man, it is essential that the accepted rules of war in that—humanitarian—sphere should continue to be

¹ See Tucker in *Law and Politics in the World Community* (Hans Kelsen Essays, 1953), pp. 31–48.

² See Morgenstern in this *Year Book*, 29 (1952), pp. 265–82.

³ See below, p. 242.

observed. It is probably true to say that that humanitarian sphere constitutes the bulk of the law of war.¹

For these reasons the modern tendency, which has found expression, in particular, in the four Geneva Conventions of 1949, has been to subject to the humanitarian rules of war also those contests which do not constitute war in the strictly legal sense of the word and to confer the status of lawful belligerents, bound by and entitled to the protection of rules of warfare, upon combatants who previously did not enjoy the protection of international law. Thus all four Geneva Conventions of 1949 provide uniformly that in case of an armed conflict which is not of an international character occurring in the territory of one of the Parties to the Convention which is a party to the conflict, the belligerents shall be bound to apply, as a minimum, certain fundamental provisions of a humanitarian nature.² The effect of these provisions is to subject the parties to a civil war—including the party which is not a recognized belligerent—to important restraints of the law of war.³ In accordance with the same tendency, Article 4 of the Convention on Prisoners of War includes in the definition of prisoners of war ‘members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power’. Finally, the same Convention marks a considerable advance upon the Hague Regulations, which apparently protected organized resistance movements only outside the area firmly occupied by the enemy. Article 4 of the Convention lays down that members of militias and volunteer corps which do not form part of the regular armed forces as well as members ‘of organised resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied’, are entitled to be treated as prisoners of war provided that they fulfil certain conditions.⁴

¹ See below, p. 241. And see Lauterpacht in this *Year Book*, 29 (1952), pp. 363-5.

² Article 3 of all four Conventions.

³ The Conventions lay down expressly that these provisions do not affect the legal status of the parties to the conflict. In particular, they do not amount to—or impose upon the lawful Government the obligation of—recognition of insurgents as belligerents. The governing principle is that the respect of some fundamental human rights is no longer dependent upon the recognition of specific status. It will be noted that Article 3 of each of the four Conventions which refers to conflicts which are not of an international character, purports to impose obligations not only upon the Contracting Parties, but also upon ‘each party to the conflict’. To that extent the Convention, in keeping with other developments in modern international law, treats persons and entities other than States as subjects of international rights and duties. For that reason it follows from a proper interpretation of the Convention that while the detaining State is entitled to put on trial prisoners of war accused of war crimes and other crimes committed prior to captivity, the utmost restraint must be exercised in respect of punishment, after prolonged hostilities, for what is in essence a political crime of treason and rebellion.

⁴ Parts II and III. In the words of Professor Paul de La Pradelle these and similar provisions give expression to the principle that ‘toute société de guerre, dès l’instant qu’elle existe en fait, doit être aussitôt saisie par le droit’: *La Convention diplomatique et les nouvelles conventions de Genève du 12 août 1949* (1951), p. 56. In fact there seems to be in modern conditions no justification for the tendency, which was predominant in the nineteenth century and which found expression to some extent in the compromise reached at the Hague Conference in 1899 on the subject, to

These, then, are the rules ensuring the continued operation of the principal humanitarian restraints in relation to hostile acts constituting treason in the contemplation of municipal law and so-called war-treason¹ in the law of belligerent occupation. The fact of the express adoption of these rules is not without some bearing in relation to hostilities arising from what some may be inclined to brand as acts of treason—of aggressive war—against international society at large.

The effects of any differentiation between the aggressor and those opposing him appear even more clearly if it is borne in mind that most rules of warfare are, in a sense, of a humanitarian character inasmuch as their object is to safeguard, within the limits of the stern exigencies of war, human life and some other fundamental human rights and to make possible a measure of intercourse between enemies during the war and some voluntary relationship after it. These rules include those relating to the limitations of the use of force; flags of truce and, generally, intercourse between belligerents in the actual line of battle; protection of passengers and crews of merchant vessels; and, above all, the protection of the civilian population in occupied territory. The latter provides a persuasive illustration of the view—which, it is here submitted, is the correct and the only practicable view—that during the war all belligerents must be held to be under a duty to respect, and are entitled to rely as among themselves on the observance of, rules of warfare as generally recognized. The belligerent occupant, even if he is the aggressor, is entitled to exact from the civilian population the obedience—which is not necessarily synonymous with allegiance—due to him under international law. To say that the population is at liberty to differentiate between a 'lawful' and an 'unlawful' occupant in the matter of obedience owed to him, is, in effect, to free the occupant from the obligation to treat the population in accordance with international law. He cannot be expected to treat as non-combatants inhabitants who claim the right to commit against him direct or indirect acts of hostility and who are not organized in a manner entitling them according to international law to be treated as lawful combatants.²

brand as illegal the activities of guerrilla troops on the additional ground that the continuation of the struggle, after the national territory has been totally occupied by the enemy without there remaining any hope of restoring the position, is a senseless act of defiance which merits reprobation. For in modern—global—warfare the complete occupation of a country may be but an episode in the campaign in which the legitimate Government, though compelled to withdraw from national territory, continues to fulfil its responsibilities in conjunction with its allies. See for this aspect of the problem Fitzmaurice in *Hague Academy, Recueil des Cours*, 73 (1948) (ii), pp. 272-7, and the present writer's 7th ed. of vol. ii of Oppenheim's *International Law* (1952), § 60.

¹ A somewhat inaccurate and probably obsolete description. See the revised § 162 in the 7th ed. (1952) of Oppenheim's *International Law*.

² 'Il n'est pas une armée au monde qui accepterait de traiter selon les lois de la guerre l'armée et les populations du pays qu'elle envahit, admettant d'être traitée comme une troupe de bandits par cette même armée et ces mêmes populations' (Bassompierre in *Revue de droit international et de la législation comparée*, 3rd ser., 4 (1923), p. 244). See also the *Final Record of*

2. *Judicial decisions.* For these reasons judicial decisions bearing upon the law of belligerent occupation in relation to inhabitants provide a cogent example of the necessity of maintaining the operation of rules of war regardless of the illegal character of the war undertaken by any of the belligerents. In the *Hostages Trial* (the case of *Wilhelm List and Others*) the United States Military Tribunal at Nuremberg, in a judgment given in 1948, gave detailed reasons for rejecting the view that, as the war was illegal on the part of Germany, the rules of warfare relating to belligerent occupation could not be invoked by her and that therefore the inhabitants were entitled to resist the German forces of occupation. It is convenient to quote this part of the Judgment:

'The Prosecution advances the contention that since Germany's wars against Yugoslavia and Greece were aggressive wars, the German occupation troops were there unlawfully and gained no rights whatever as an occupant. It is further asserted as a corollary, that the duties owed by the populace to an occupying power which are normally imposed under the rules of International Law, never became effective in the present case because of the criminal character of the invasion and occupation.

'For the purposes of this discussion, we accept the statement as true that the wars against Yugoslavia and Greece were in direct violation of the Kellogg-Briand Pact and were therefore criminal in character. But it does not follow that every act by the German occupation forces against person or property is a crime or that any and every act undertaken by the population of the occupied country against the German occupation forces thereby became legitimate defence. . . .

'... International Law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after

the Geneva Diplomatic Conference of 1949, vol. ii, Section A, p. 426. There is in this respect a measure of conflict, in a sense unavoidable, between the considerations adduced in the text above and the modern tendency to enlarge the scope of lawful combatants so as to include organized resistance movements behind the lines in occupied territory. It may be difficult to lay down in advance rigid rules likely to assist in the solution of the problem involved. In particular, such assistance cannot be found either in exclusive reliance upon considerations of humanity neglectful of the safety of the occupant or in methods of terror on the part of the occupant. Neither, as is submitted below, can it be found in the distinction between lawful and unlawful wars. Decrees of the lawful sovereign in exile and the decisions of his courts after the liberation of the territory do not necessarily supply a standard capable of general application. The Dutch Royal Emergency Decree of September 1944 gave to the 'Netherlands Forces of the Interior' the status of a part of the Dutch army on the ground of 'the necessity of regarding as members of the armed forces all those who during the liberation of the territory were actively engaged in expelling the enemy'. In the case of *Van Hove de Feyter v. Fire Insurance Company* (*Annual Digest*, 1947, Case No. 81) the District Court of Dordrecht held in 1947 that even prior to that Decree acts committed by the members of the Dutch resistance movement were 'acts of war'. See also to the same effect *Smulders and Piccinati v. Société Anonyme 'La Royale Belge'*, decided in 1943 by the Civil Court of Liège (*Annual Digest*, 1943-5, Case No. 102), where it was held, with regard to an Italian officer killed in Yugoslavia, that in occupied territory, where the partisan resistance had never ceased, an attack upon officers of the army of occupation in uniform must be regarded as an act of war not covered by an insurance policy. And see, even more emphatically, the decision given by the Belgian Civil Court of Huy in *Peeterbroek v. Assurances Générales de Paris (Pasicrisie Belge*, 1947, iii, p. 15; *Annual Digest*, 1946, Case No. 98).

the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.¹

The Tribunal held, accordingly, that inhabitants who waged hostilities against Germany without complying with the provisions of Article 1 of Hague Convention No. IV relating to lawful combatants, were liable to be treated as guerrillas.

In the *Zuhlke* case the Netherlands Special Court of Cassation, in a judgment given in 1948, dissented from the decision of the Court below which held that, as the war between Germany and the Netherlands was an 'international crime' on the part of Germany, 'everything done by Germans as members of the occupying authorities, except that which occurred in the normal exercise of the law', was 'illegitimate'. The Court of Cassation held that it was 'going too far to regard as war crimes all acts committed against the Netherlands or the Netherlands by the German forces and other organs during the war, solely on the grounds of the illegal nature of the war launched by the then German Reich'.² At the same time the Court expressed the view that as the war was an international crime on the part of Germany, Holland would have been entitled to answer the aggression with reprisals,³ even with regard to the normal operation of the laws of war on land, at sea, and in the air.⁴ This latter qualification is, it is submitted, open to question inasmuch as, if conceded, it would amount to conferring upon the victim of aggression the right to disregard, by way of reprisals, the laws of war as against the guilty belligerent.⁵

Other judgments given by Dutch courts are to a similar effect. Thus, for instance, in the case of *General Christiansen*, who was commander of the German army of occupation in Holland, the Netherlands Special Court for War Criminals at Arnhem found the accused guilty of various acts of reprisals against the Dutch resistance movement. The Tribunal held that 'the rules of international law, in so far as they regulate the methods of warfare and the occupation of enemy territory make no distinction between wars which have been started legally and those which have been started illegally'. The Court pointed out that customary law concerning warfare and belligerent occupation continued to be valid during the Second World War; that the inconsistency resulting therefrom was a consequence of the

¹ *War Crimes Trials*, 8 (1949), pp. 59, 60, 77.

² *War Crimes Reports*, 14 (1949), pp. 143-4.

³ *Ibid.*

⁴ In a footnote appended to this case in *Annual Digest*, 1948, at p. 416, Professor Verzijl admits that the thesis adopted by the Court 'though fundamentally correct . . . might produce serious consequences during a war'.

⁵ After the Second World War municipal courts of some allied countries gave decisions which endowed the so-called resistance movements with a certain degree of legitimacy as against the occupant. However, the main argument relied upon in these decisions was not the unlawfulness of the war waged by the aggressor, but the authorization by the lawful Government. See above, p. 214, n. 2.

imperfect state of international organization at that time; and that 'the Court had to accept that imperfect state as existing law'. Accordingly, the Tribunal held that the occupant waging an illegal war was entitled, in principle, to punish members of the resistance movement except when such resistance was due to the unlawful acts of the occupant. On the other hand, the Court held that the resistance movement was lawful seeing that there was no rule of international law obliging the inhabitants to render obedience to the occupant—except that, as in the case of spies, international law permitted the belligerent to punish what was an otherwise legal act. The Court found the accused guilty on the ground that the reprisals ordered by him against the civilian population exceeded the bounds permitted by international law.¹

In the *Grauser* case the Supreme National Tribunal of Poland, without apparently drawing direct practical conclusions from its observations,² remarked that the hostilities which Germany launched in 1939 against Poland did not constitute a war according to international law, but a 'criminal invasion' in violation of a pact of non-aggression. Accordingly, in the view of the Tribunal, the occupation of Polish territory by Germany was not an occupation in the true meaning of the word, but 'an unlawful seizure of another's territory by force and compulsion'.³

It is pertinent in this connexion to refer to an extreme example of the consequence of the view that the guilty belligerent cannot rely on the law of war. That view, when pushed to its rigid logical consequences, leads to the conclusion that the typical manifestation of belligerent action in war, namely, the killing of lawful combatants, is a criminal act of murder. That view seems occasionally to have been asserted.⁴ Its corollary would seem to be that members of the armed forces of the belligerent waging an unlawful war would be liable for murder if captured. Such consequences lend emphasis to the assertion of the inadequacy of the major proposition from which they are derived. In fact they have been occasionally adduced as a

¹ *Annual Digest*, 1948, Case No. 121.

² Except, possibly, that, the occupation being unlawful *ab initio*, it could not subsequently mature by lapse of time into legal title. The Tribunal invoked the maxim of Roman law, *quod ab initio turpe est, non potest tracto tempore convalescere*.

³ *War Crimes Reports*, 13 (1949), p. 110.

⁴ See the observations made in 1946 by the Chief British Prosecutor, Sir Hartley Shawcross, in his closing speech before the International Military Tribunal at Nuremberg. He said: 'The killing of combatants in war is justifiable, both in international and in national law, only where the war is legal. But where the war is illegal, as a war started not only in breach of the Pact of Paris but also without any sort of declaration clearly is, there is nothing to justify the killing, and these murders are not to be distinguished from those of any other lawless robber band': *Proceedings of the Tribunal* (H.M. Stationery Office), vol. 19, p. 423. See also *ibid.*, vol. 4, p. 351, for a similar view of the French Prosecutor. For the view of the German defence see *ibid.*, vol. 18, pp. 88, 89. It is reasonable to interpret Sir Hartley's observations in their context, i.e. as referring not to the responsibility of the individual members of the armed forces of the aggressor but to the liability of those guilty of planning and instigating the unlawful war.

warning against indiscriminate reliance on legal logic in this matter. Thus in the *Altstötter* case (the *Justice Trial*) the United States Military Tribunal at Nuremberg, in a judgment given in 1947, declined to treat as relevant the fact of aggressive war in deciding whether the 'Draconic laws' enacted in Germany, for which the accused were responsible, constituted crimes against humanity. It said: 'If we should adopt the view that by reason of the fact that the war is a criminal war of aggression every act which would have been legal in a defensive war was illegal in this one, we would be forced to the conclusion that every soldier who marched under orders into occupied territory or who fought in the homeland was a criminal and a murderer. The rules of land warfare upon which the prosecution has relied would not be the measure of conduct and the pronouncement of guilt in any case would become a mere formality.'¹

Other tribunals have declined, in different spheres, to assent to the proposition that during the war the unlawful belligerent is not entitled to rely on rules of warfare. In the *German High Command Trial* (case of *Von Leeb and Others*), before the United States Military Tribunal at Nuremberg, it was contended by the prosecution, with respect to the charge of wanton destruction of property, that the accused could not properly plead military necessity: 'The defence of military necessity can never be utilized to justify destruction in occupied territory by the perpetrator of an aggressive war. To allow such a defence to be interposed would result in a farcical paradox. It is perfectly apparent that the phrase "imperatively demanded by the necessities of war" was never intended to justify the commission of one criminal act in order to extricate the perpetrator from the consequences of another criminal act.'² Referring to the presence of the accused in Russia, where he was 'acting in furtherance of a criminal design', the prosecution added: 'The only military necessity he can point to was caused by his being where it was a crime for him to be in the first place.'³ The Tribunal did not adopt that reasoning. Without examining it directly, it answered it by implication by finding, in the case of most of the accused, that it had not been strictly proven that, in the circumstances of the case, the devastation went beyond military necessity: 'What constitutes devastation beyond military necessity in these situations requires detailed proof of an operational and tactical nature.'⁴

In *Aboitiz v. Price* an American court rejected the contention that as the war waged by Japan was a war of aggression the occupation decrees of the

¹ *Law Reports of Trials of War Criminals*, 6 (1948), p. 52.

² *Ibid.* 12 (1949), p. 124.

³ *Ibid.*

⁴ *Ibid.* See also the *General Devastation (Germany)* case, decided by the *Oberlandesgericht* of Dresden (*Annual Digest*, 1948, Case No. 124), and *In re Garbe*, decided by the *Oberlandesgericht* of Kiel (*ibid.*, Case No. 125)—both denying the relevance of the illegality of the war waged by Germany. See below, p. 241, as to both cases.

Japanese authorities in the matter of currency were invalid. The Court did not feel it necessary 'to depart from established rules of international law'. It said: 'tested by the principle that a belligerent occupant's decrees or regulations must be in the interest of the welfare of the inhabitants to be entitled to recognition of the Court', the Japanese currency was valid.¹

It is only on rare occasions that courts have drawn consequences—although not of an extreme nature—from the proposition that the author of an unlawful war cannot avail himself during the war of all the rights of belligerency. Thus, in the *Rauter* case, the Netherlands Special Court of Cassation, in a somewhat discursive judgment given in 1949, seems to have denied that Germany was entitled to have recourse to reprisals against Holland and the Dutch population. The Court said: 'The appeal to this, in principle recognised, right of a belligerent State to take reprisals, provided they are of a permissible nature—eventually also against the population of occupied territory—cannot be of any avail to the defendant, as there was no previous international offence committed by the Netherlands against the German *Reich*, so that the German *Reich* had absolutely no right to take genuine reprisals. It is indeed well known all over the world . . . and also convincingly established by the International Military Tribunal in Nuremberg . . . that the former German *Reich* unleashed against the Kingdom of the Netherlands, as it did against various other States in Europe, an unlawful war of aggression, and by so doing began on its part to violate international law, an international offence for which in itself the Kingdom of the Netherlands was already justified in answering by taking reprisals against the aggressor.'²

In its judgment given in 1949 in the *Weizsaecker* case, the United States Military Tribunal at Nuremberg went far in the direction of drawing conclusions, some of which are controversial, from the Pact of Paris. From the proposition, which is unobjectionable, that 'it implicitly authorized the other nations of the world to take such measures as they might deem proper or necessary to punish the transgressor' it concluded that 'it [the Pact of Paris] placed the transgressor outside the society of nations'. Yet there is room for the opinion that the very act of punishing the transgressor recognizes, in a negative and specific sense, his place in society. What is of particular interest in the present discussion is the view of the tribunal that 'he who initiates aggressive war loses the right to claim self-defence against those who seek to enforce the Treaty', and that that rule is merely 'the embodiment, in international law, of a long established principle of criminal

¹ (1951), 99 F. Supp. (D. Utah) 602. The Court, however, refused to give effect to those aspects of the Decree which it considered contrary to international law.

² *War Crimes Trials*, 14 (1949), p. 134.

law'.¹ The Tribunal quoted here from Wharton's *Criminal Law*: 'There can be no self-defence against self-defence.'²

In general, however, there is no judicial authority in support of the proposition that the aggressor is not entitled during the war to rely on those rules of warfare which bear on the actual conduct of hostilities or that the members of his armed forces are, after the war, liable to punishment for acts committed during the war in conformity with rules of warfare.

3. *Relevance of absence of authoritative determination of aggression.* The reasons which make it imperative to permit the full application, during the war and as between the belligerents, of the rules of war are especially cogent when it is borne in mind that in the present state of international organization there may be no means, so long as the war lasts, by which an authoritative judgment can be arrived at on the question as to which belligerent side is the aggressor. As already stated, nothing short of the unanimous concurrence of the permanent members of the Security Council is sufficient for a binding determination that a particular State has resorted to war in violation of the principles of the Charter. In the presence of such unanimity, it is unlikely that there will take place hostilities on an extensive scale which will make relevant the question here discussed.

For similar reasons there is difficulty in accepting the suggestion, which is occasionally made, that the State which is the victim of aggression should be entitled to resort to weapons the use of which may otherwise be illegal. In the absence of an authoritative determination of the question of aggression the plea of self-defence will be invoked alike by the guilty belligerent and by his victim. In the din of battle the voice of the latter may be drowned by strident and cynical protestations of the aggressor asserting the justification of the resort, on his part, to the illegal weapons. Neither is there good reason for assuming that at the beginning of the hostilities such weapons will not be available to the aggressor and that in that case, even if he does not go to the length of representing himself as the victim of aggression, he will tolerate passively the use of prohibited weapons against himself.

There is a superficial attractiveness in the notion that hostilities conducted for the purpose of collective enforcement of peace should be governed by a code of rules different from those obtaining in ordinary wars and that efforts of international lawyers ought to be directed towards that end. The attractiveness of that idea tends to diminish in proportion as we realize that the practical scope of its application is insignificant. For it must be assumed that where there has been a valid determination of aggression by an appropriate vote, including that of the permanent members of the Security Council, then, as a rule, the force at the disposal of the United Nations will be so overwhelming as to approach rapid police action

¹ *Transcript of the Proceedings*, p. 28,105.

² Vol. i, 12th ed., p. 180.

permitting of no prolonged or serious resistance. In cases in which such unanimous designation of the aggressor is not accompanied by effective and immediate penalization of the law-breaker and in which the enforcement action is transformed into drawn-out hostilities, it is clear, for reasons stated, that the rules regulating such hostilities cannot differ appreciably from those governing the principal aspects of the relations of the belligerents. The same applies, even more cogently, to hostilities not preceded by a binding determination of aggression.

4. *Relevance of the designation of the contest. The hostilities in Korea.* The above submissions are independent of the question whether such hostilities are described as war, international police action, collective enforcement of peace, collective self-defence, or the like. The dignity and the purpose of the collective enforcement of the rule of law in international society may require that it should rank in a category different from war as traditionally understood in international law. This is so although from the point of view of legal effect the distinction is, for most purposes, without a difference. During the hostilities arising out of the invasion, in 1950, of South Korea by North Korea there was no disposition on the part of the United Nations as a whole or of the individual States participating in the enforcement action under Chapter VII of the Charter to refer to the contest as war in the ordinary legal sense of the term. On the contrary, express and formal statements were made to the effect that the hostilities did not constitute war¹ and that the action undertaken on behalf of the United Nations did in law constitute international action by the United Nations notwithstanding the predominance of the participation of the United States and the fact that a commander designated by the United States was the commander of the forces of the United Nations flying the flag of the United Nations.² Municipal courts, especially when prompted by the merits of the case before them, declined—though not invariably—to consider the resulting hostilities as war in the technical sense of the word.³

¹ See below, p. 222, n. 1.

² The Government of the United States repeatedly refused to accept protests addressed to it by Soviet Russia and China in connexion with certain acts of the forces of the United States. It maintained that such complaints must be addressed to the Secretary-General of the United Nations.

³ See, for example, *Western Reserve Life Insurance Co. v. Meadows*, decided in 1953 by the Texas Court of Civil Appeals, 256 S.W. (2d) 674, *American Journal of International Law*, 47 (1953), p. 719, where the Court refused to hold that the hostilities in Korea amounted to war in the meaning of an insurance policy which exempted from the double indemnity clause cases in which the insured was in military service in time of war at the date of the accident. See to the same effect *Pennsylvania Mutual Life Insurance Co. v. Beley* (1953), 373 Pa. 231, 95 A. 2d 202; *Harding v. Pennsylvania United Insurance Co.* (1953), 373 Pa. 270, 95 A. 2d 221. See, on the other hand, *Weissman v. Metropolitan Life Insurance Co.* (1953), 112 F. Supp. 420. See for comment thereon Brandon in *International and Comparative Law Quarterly*, 2 (1953), p. 650. The United States Court of Military Appeals considered the Korean conflict to be a war for the purposes of military justice: *United States v. Bancroft* (1953), 3 U.S.C.M.A. 3, 11 C.M.R. 3; *United States v. Gann et Al.* (1953), 3 U.S.C.M.A. 12, 11 C.M.R. 12. In relation to charter parties divergent decisions

At the same time it was recognized that for some purposes, as for instance with reference to the law of treason, the hostilities, though not described as war in the technical sense of the term, could properly be treated as if they constituted war.¹ Under municipal law this may also be the position with regard to such questions as the treatment of the nationals of the aggressor State as alien enemies, prohibition of trading with the enemy, the application of Foreign Enlistment Acts, effect upon treaties, and jurisdiction of prize courts—although in all these cases the enactment of special legislation assimilating the hostilities to war is probably the preferable course. Moreover, even with regard to some international obligations a proclamation of national emergency through the instrumentality of municipal law might meet the exigencies of the case. This might apply, for instance, to the International Civil Aviation Convention and the International Air Service Transit Agreement of 1944, which provide for an exception to the obligations of the parties when a State 'declares a state of national emergency and notifies the fact to the Council'. In other cases, such as

have been given in commercial arbitrations on the question whether the Korean conflict was 'war': see *The Katrine Maersk* (1951), A.M.C. 324, and *The Simon Benson*, *ibid.*, 585, for an affirmative reply to this question. But see *The Yankee Fighter*, *ibid.* 579. See also *Australian Communist Party v. Commonwealth of Australia* (1951), 83 C.L.R. 1, where the Court held that in October 1950, at a time when Australia was participating in the hostilities in Korea, an ostensible state of peace existed. In the words of Dixon J.: 'Australian forces were involved in the hostilities in Korea, but the country was not of course on a war footing' (at p. 196). McTiernan J. held that at the material time the Commonwealth was not engaged in any hostilities except in Korea but that the prevailing state of affairs was peace, not war. Latham C.J., who held, in a dissenting judgment, that neither the existence of war in the technical sense nor actual fighting were a condition of the exercise of defensive power, pointed to the necessity of a reconsideration of the maxim *ubi bellum non est, pax est*. See in this connexion the observations of Jessup on a state of 'intermediacy' in *Acta Scandinavica Juris Gentium*, 23 (1953), pp. 16–26. See also *Marcus Clark & Co. v. Commonwealth*, *Australian Law Journal*, 26 (1952), p. 321, to the effect that although, notwithstanding the hostilities in Korea, there existed an ostensible state of peace, the condition, in 1951, of 'severe international tension' was a material factor in upholding the applicability of the Defence Preparations Act of 1951. See also *R. v. Burns*—commented upon by Green in *International Law Quarterly*, 4 (1951), pp. 463–6—where, in connexion with a prosecution for sedition, the Australian Foreign Office gave the following answer to the question whether North Korea was at war with Australia: 'The Government has sent land, sea and air forces to Korea to assist in taking military measures in order to restore international peace and security in Korea as provided in Chapter 7 of the Charter of the United Nations. The Australian forces are engaged in active hostilities and had suffered intensive casualties. That Australia is at war *de facto* is clear. Whether or not Australia is at war *de jure* depends on the interpretation of the Charter as applied in the circumstances.' It was stated in the answer that Australia had not recognized 'the People's Democratic Republic of Korea'.

¹ It was stated by Sir Hartley Shawcross, the Attorney-General, in the British House of Commons on 20 November 1950 that the law of treason 'is as applicable to such a conflict as it is to an ordinary war between State and State' (*House of Commons Deb.*, vol. 481, col. 13). The Attorney-General did not refer to the Korean hostilities as war, but preferred to describe them as 'collective action of other States on behalf of the United Nations with the object of restoring peace and enforcing international law'. Similarly, on 11 June 1952, the Secretary of State for Foreign Affairs in an answer to the question whether a state of war existed at that time between the United Kingdom and the Republic of North Korea stated that 'we are not engaged in a war with the Republic of North Korea because we do not admit that there is such a State' (*ibid.*, vol. 502, col. 202). He stated at the same time that 'the United Kingdom forces in Korea are engaged in action under the United Nations for the resistance of aggression'.

International Postal Conventions, appropriate action may be taken under the terms of the instruments in question. Thus the Agreement between the United Nations and the Universal Postal Union of 4 July 1947 provides that 'as regards the Members of the United Nations, the Union agrees that in accordance with Article 103 of the Charter no provision in the Universal Postal Convention or related Agreements shall be construed as conflicting with its obligations to the United Nations'.

However, while for the reasons stated and without impeding unduly the common effort of resistance to aggression it proved possible during the hostilities in Korea to avoid the designation of these hostilities as war, there was at the same time full recognition of the fact that unavoidable mutuality of obligations could not be set aside by a terminological device. Although no declaration of war was issued, neither side challenged the applicability of rules of warfare. In particular, both sides formally declared their determination to abide by the provisions of the Geneva Convention relating to prisoners of war.¹

5. *Rules of warfare and reprisals against the aggressor.* Reference may be made in this connexion to the application of reprisals, during the war, against the aggressor State in matters not related directly to hostilities but bearing on the economic aspects of warfare. Thus in the retaliatory Order-in-Council issued by Great Britain in 1941 on the outbreak of the war with Japan measures were announced for 'restricting the commerce of Japan'.² In its two opening recitals the Order referred to the fact that 'by reason of her unprovoked aggression His Majesty has been compelled to proclaim the existence of a state of war with Japan' and that 'Japan had carried out attacks against British, United States and other territory without previous warning, either in the form of a declaration of war, or an ultimatum with a conditional declaration of war, in flagrant violation of International Law and particularly of Article 1 of the Third Hague Convention relative to the opening of hostilities'. It is not clear why, if the intention of the Order was to treat the illegality of the war on the part of Japan as a ground for the adoption of reprisals, no reference was made to the General Treaty for the Renunciation of War to which Japan was a party. Moreover, it appears from the other recitals of the Order relating to Japan that the intention was to state that by becoming an ally of Germany and Italy she automatically exposed

¹ The North Korean authorities did so on 13 July 1950 and the Chinese authorities on 16 July 1952. On 23 July 1952 the United States Department of State formally requested the Soviet Government to use its good offices to ensure actual compliance, on the part of the North Korean and Chinese forces, with the provisions of the Convention, in particular Articles 23 (placing of prisoners in the vicinity of military objectives), 126 (inspection by an impartial international body), and 72 (delivery of relief parcels): *Bulletin of Department of State*, 27 (1952), p. 171. See on the application of the Geneva Conventions during the hostilities in Korea Mayda in *American Journal of International Law*, 47 (1953), pp. 414-38.

² Statutory Rules and Orders, 1941, No. 2136.

herself to the impact of the retaliatory orders in the matter of maritime war previously issued against Germany and Italy. These latter Orders were in fact recited in the Order against Japan. But the Order against Germany was based not on the illegality of the war undertaken by her, but on the fact of the violation by that belligerent of the laws of maritime war. Similarly, the Order against Italy was based on the sole fact that she had become an ally of Germany against whom a retaliatory Order had previously been issued. It would thus appear that there was, during the Second World War, no disposition to deny to the aggressor the benefit of the rules of war, in the sphere of maritime economic warfare, on account of the illegality of the war. It may be controversial to what extent such reprisals are open to the general objections outlined above which militate against the denial of belligerent rights to the aggressor.¹ While they do not bear directly upon hostilities proper, the vital importance of the economic weapon is such that reprisals of that nature may become the starting-point for a more general abandonment, by both belligerents, of the restraints of the rules of warfare not only at sea.

III

Acquisition by the aggressor of title over property in the course of an illegal war

As has been shown, compelling reasons of humanity and order lead to the adoption of the view that logic and principle must stop short of denying to the aggressor, during the war, the right to rely on accepted rules of warfare in matters relating directly to the conduct of hostilities. The question may now be examined to what extent these considerations require that the aggressor waging an unlawful war should be able to rely on rules of warfare

¹ For a suggestion that they may properly be resorted to for that purpose see Rowson in this *Year Book*, 23 (1946), p. 352.

Reference may be made in this connexion to yet another possible consequence of the illegality of the war on the part of one of the belligerents. Article 84 of the Charter of the United Nations provides that it is the duty of the Administering Authority to ensure that a trust territory shall play its part in the maintenance of international peace and security and that, with that object in view, the administering authority 'may make use of volunteer forces, facilities and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for local defence and maintenance of law and order within the trust territory'. That provision leaves open the possibility of the total assimilation of trust territory to a region of war in hostilities in which the Administering Authority is engaged not inconsistently with or in compliance with its obligations under the Charter. In such cases the Administering Authority is entitled to use the trust territory as its own and, to that extent, the latter becomes a region of war. However, the aggressor would be adding to his principal wrong by treating the trust territory as a region of war in excess of the irreducible minimum required by the conduct of hostilities. Similarly, if the Administering Authority should happen to be the aggressor it would not be entitled to use the trust territory for the purposes of its unlawful war. To the extent to which the aggressor complies with that obligation the trust territory must be treated by others as remaining outside the orbit of the region of war.

for acquiring title and validly transferring it in respect of acts which are otherwise lawful, such as requisition, confiscation by way of penalty for ordinary criminal offences, other appropriation of public and private enemy property, and captures in prize. This aspect of the problem is of distinctly limited importance compared with the question of the operation of the law of war proper. The view that at least in this sphere the aggressor cannot benefit from the rules of warfare has not secured judicial acceptance. This is so although there is force in the submission that this is the very minimum of principle that can be salvaged from a disturbing situation which otherwise compels us to ignore altogether the fact of the illegality of war.

Undoubtedly—except in relation to authorities which are subservient to him—whether the war be lawful or not, the belligerent occupant does not acquire title in respect of acts which are contrary to the law of war. Thus if he confiscates private property in violation of the law of war or, which amounts to the same, if he requisitions property without payment or effective substitute therefor, he does not, in the contemplation of international law, acquire title. Those who take it from him, whether for consideration or not, do so at their peril. Any court free to administer the law impartially is entitled and bound to treat such purported title as invalid. The practice of municipal courts on the subject is well established.¹ There have been instances, after the First² and the Second World Wars,³ in which such acts on the part both of the agents of the occupant and his successors in title have been held to be not only null and void but also involving criminal responsibility. In the Second World War, confronted with a systematic policy of spoliation and plunder on the part of Germany in occupied territory, the Allied Governments issued an express warning to that effect. In that warning, which was declaratory of the correct legal position and which was addressed in particular to persons in neutral countries, the Allied Governments announced that they intended to 'do their utmost to defeat the methods of dispossession' practised by Germany in

¹ In *Laurent v. Le Jeune* the Belgian Court of Cassation held that a requisition not accompanied by payment was no more capable of transferring property than theft was (*Annual Digest*, 1919-22, Case No. 343). See also *Lucchesi v. Malfati*, decided by an Italian Court (*Foro Italiano*, 69 (1944-6), p. 985); *Secret v. Loizel*, decided by a French Court (*Annual Digest*, 1943-5, Case No. 164); *Thiriez v. Descamps*, a decision of a Belgian Court (*Pasicrisie Belge*, 1949, iii, p. 19); and the decision of the Court of Appeal of Liège of 21 March 1951 (*Jurisprudence de la Cour d'Appel de Liège*, 1951, p. 273, commented upon by Bodenheimer in *American Journal of Comparative Law*, 1 (1952), p. 111). See also Miss Morgenstern's article on the subject of belligerent occupation in this *Year Book*, 28 (1951), pp. 300-15. And see also above, p. 212.

² For an account of cases in which criminal proceedings were instituted by the French and Belgian authorities in 1919 in the Rhineland against German manufacturers who had bought machines and plant illegally carried away by Germany from France and Belgium see Nast in *Revue générale de droit international public*, 26 (1919), pp. 111-28.

³ See the *Flick Trial* (*War Crimes Reports*, 9 (1949), p. 48); the *Krupp Trial* (*ibid.*, p. 69). In all the cases German industrialists were found guilty of assisting in the spoliation of private and public property in occupied territory.

occupied territory. They reserved their right to declare invalid, *inter alia*, transfers of property and interests situated in territories under enemy occupation.¹ That warning was subsequently acted upon by the courts of neutral countries—in particular of Switzerland.²

However, the question with which we are here primarily concerned is of a different nature. It is the question of the effect of measures which would be lawful but for the fact that they were taken by a belligerent waging an unlawful war. What is the position if such a belligerent purports to acquire title as the result of a requisition effected in full conformity with the Hague Regulations? Does the person to whom the belligerent waging an unlawful war subsequently sells that property acquire title in it? Does the purchaser of a ship lawfully condemned by such a belligerent acquire title over her? What is the position with regard to booty and other public property of his adversary lawfully appropriated by the aggressor and transferred by him to a purchaser for value? It would appear—and, on the face of it, the answer does not seem to be inconsistent with principle—that no enforceable right in such property can be claimed by the guilty belligerent or his transferees or successors in title and that, in particular, persons who acquire it from him ought not to be in the position to assert successfully a title thus obtained before any courts independent of his power. It is convenient, without fully subscribing to them, to formulate the reasons urging that conclusion.

The main reasons, outlined above, which prompt the conclusion that during the war, in the relations of the belligerent, the fact of the illegality of the war must be left out of account do not seem, on the face of it, to apply to acquisition of title to property. On the other hand, there appears to be grave objection to the aggressor being allowed to retain, after the war, any profit that may have accrued to him from his illegality. The same applies to those who go out of their way to lend him support by acquiring from him property of which he had dispossessed the victim of aggression or his nationals. Such denial of the validity of the title acquired or transferred by the aggressor would appear to be the very minimum of the consequences flowing from the illegality—and criminality—of his original action. For the operation of the rules of war, during an illegal war and in the mutual relations of the belligerents as far as actual hostilities are con-

¹ Misc. No. 1 (1943), Cmd. 6418.

² The Swiss Ordinance of 10 December 1945 provided that 'persons who have been despoiled of movable property or securities in territory occupied by a belligerent in a manner contrary to international law by force, confiscation, requisition, or similar acts on the part of the civil or military authorities, or the armed forces of the occupant, are entitled to reclaim the property from the present possessor in good or bad faith if it is situated in Switzerland'. A long series of decisions of the Swiss Federal Court gave effect to that Decree. See, for example, *Rosenberg v. Fischer*, where the Court held that an object seized in violation of international law was stolen property in the meaning of Article 934 (1) of the Swiss Civil Code (*Annual Digest*, 1948, Case No. 150; *Annuaire Suisse de droit international*, 6 (1949), p. 139); *R. v. A.G.K. and P.* (ibid. 7 (1950), p. 160); *L.M. v. Swiss Banks* (ibid. p. 161).

cerned, does not follow from principle. It seems to be contrary to principle—although it follows from compelling reasons of humanity. When these reasons cease to operate, the fact of the illegality of the war must be taken into account. The person who purchases property from the aggressor does so at his own risk. There is no compulsion for him to do so. Undoubtedly, the inhabitants of the occupied territory must obey the orders of the aggressor; they have no alternative.¹ But they need not strengthen his war effort by excess of co-operation such as buying goods requisitioned or otherwise appropriated by him. If they do so, they must take the consequences. The same can properly be expected of persons within neutral jurisdiction. It is inconsistent with both international law and international morality that neutral territory should become for the aggressor a convenient and profitable repository for the spoils of aggression.

It may be noted that the view thus stated as to the invalidity of title acquired by the aggressor—even if acquired in accordance with the law of war—was formulated with some clarity, though without elaboration, in the

¹ This is probably the true—and, it is submitted, the correct—*ratio decidendi* in the interesting case of *The Adelaide Star*, decided in 1947 and 1948 by Danish courts. This was a claim by the Blue Star Line against, *inter alios*, a Danish shipbuilding company which, in pursuance of a requisition order, handed over to the German occupation authorities a ship which under a contract concluded before the Second World War was being built for the plaintiff company. The ship had been largely completed before the war. In conformity with the requisition order, the Danish firm completed the ship and handed her over to the German authorities. The ship was subsequently sunk in the course of war operations while in German service. The plaintiff company contended, amongst other things, that as the German invasion of Denmark was illegal the seizure of the ship was unlawful and could not be relied upon by the defendants. The Court of first instance rejected that argument. It said: 'The Court cannot uphold the plaintiff's view that in consequence of the German invasion of Denmark being a breach of international law, it should be impossible to consider the seizure of M/S *Adelaide Star* as having been justified under general international law. The unlawful invasion is actually found to be analogous with an unlawful war—e.g. one waged in patent violation of a non-aggression pact—in so far as it is bound to carry with it the legal effects of war.' (This part of the judgment is reproduced, with illuminating comment, by Professor Ross in *Jus Gentium*, i (1949), pp. 6–10.) The Supreme Court of Denmark, in a judgment given in 1948, upheld that part of the judgment of the Court below, though on substantially different grounds. It said: 'It is not . . . necessary to define our attitude to the question whether the requisitioning of the *Adelaide Star* was contrary to international law. In view of the absolute character of the German military decision to requisition the ship . . . and of the actual conditions existing in Denmark at the time concerned, it must be held that the requisitioning could not have been prevented, and the Court cannot hold that the shipyard or the Danish Government have acted [in respect of the German demands] in such a manner as to render them liable in damages to the appellant for the non-fulfilment of the contract' (*Annual Digest*, 1948, Case No. 126). This reasoning of the Court seems unobjectionable—except, possibly, that it may not have fully taken into account the allegation of the plaintiff that the defendant firm exhibited a somewhat excessive measure of co-operation with the German authorities in completing the ship for them. An Italian court—the Court of First Instance of Florence—seems to have been more rigid in disregarding the effects of an unlawful requisition. It held that such a requisition provides no defence for a bank sued by a person whose deposit was so seized: *Weber v. Credito Italiano (Foro Italiano*, 69 (1944–6), i, p. 639; *Annual Digest*, 1946, Case No. 143). In *In re Van der Giessen* the Netherlands Special Court of Cassation held in 1948 that the accused could not plead, as a defence in the prosecution for collaboration with the enemy by completing the building of a tanker originally ordered by the Dutch Government, that the contract passed to the enemy as booty of war. Only *force majeure* could excuse the performance of such acts for the benefit of the enemy (*Annual Digest*, 1948, Case No. 161).

Harvard Research Draft of 1939 on the *Rights and Duties of States in Case of Aggression*. That Draft laid down in Article 5 that, subject to the continued application of humanitarian rules prescribed by customary and conventional international law, 'an aggressor does not have any of the rights which it would have if it were a [lawful] belligerent' and that 'titles to property are not affected by an aggressor's purported exercise of such rights'. It is also possible that a measure of recognition of that principle may be found in those occasional pronouncements of neutral courts which have declined to give effect to decrees of the belligerent occupant on the ground that such occupation had not been recognized—apparently on the ground of the illegality of the war on the part of the occupant. Some such interpretation may be put on the judgments of certain courts of the United States during the Second World War at a time when the United States was neutral. Thus in *Amstelbank, N.V. v. Guaranty Trust Company of New York*, the decision of the Court was based on the fact that 'the government of the United States has refused to recognize the Germany military control of Holland' and that 'therefore any German decrees promulgated in the Netherlands should be given no force or effect whatever in the determination of questions involving property in this State'.¹ Normally, the question of recognition of belligerent occupation does not arise, and the refusal to recognize it may perhaps be explained by reference to the illegality of the war undertaken by the aggressor. The same line of thought may be discerned indirectly in the criticism, by a high authority on the subject, of the judgment given by an English court in 1937 in *Bank of Ethiopia v. National Bank of Egypt and Liguori*.² Sir Arnold McNair, while questioning the decision of the Court on the specific ground that it invested the Italian occupation of Abyssinia with a degree of power not warranted by the rules of international law in the matter of belligerent occupation, doubted its soundness also on the additional ground that it 'puts a premium upon aggression by the recognition which it gives to the decrees of a successful invader'.³

While the principle that title acquired by the belligerent waging an unlawful war is invalid seems prompted by cogent legal considerations, it has not become part of the practice of courts. In examining, after the Second World War, the validity of the title acquired or transferred by the aggressor, courts have done so only by reference to the question whether such title was acquired in conformity with the law of war. With minor exceptions they have not considered as relevant the fact that the war was an illegal war of aggression on the part of Germany and her allies. Moreover, it appears

¹ *Annual Digest*, 1941-2, Case No. 171. See also *Koninklijke Lederfabriek 'Oisterwijk' N.V. v. Chase National Bank of the City of New York*: *ibid.*, Case No. 172.

² [1937] Ch. 531.

³ *Legal Effects of War* (3rd ed., 1948), p. 341.

that in most of these cases the question was not raised by the interested party.¹

Neither was the question of the relevance of the illegality of the war raised in the cases in which courts have held that either the acquisition or the subsequent transfer of title by the occupant was invalid on the ground that the original dispossession was contrary to international law.² It might be said that in these cases the courts were in a position to reach their conclusion by reference to the fact that as the action of the occupant was in violation of the rules of warfare, it was unnecessary for them to raise the wider issue of the applicability of the law of warfare. However, such an argument is persuasive only on the assumption that the view as to the nullity, in this sphere, of the acts of aggression because of the initial inapplicability of rules of warfare, is unfounded or at least controversial.

The same question arises with regard to title acquired or transferred by the aggressor as the result of valid captures and condemnations in prize proceedings. There would appear to be no adequate explanation—such as prompts the full application of the law of war in other spheres—why the aggressor waging an illegal war should be deemed to have acquired a valid title in vessels and goods, whether enemy or neutral, condemned as lawful prize even if the proceedings were otherwise in accordance with international law. The same would seem to apply to persons who acquire from him such vessels and goods and who thus aid him in his war effort. Yet, somewhat strangely, this does not appear to have been the view taken by

¹ An interesting case, *French State v. Établissements Monmousseau* (Sirey, 1949, Part II, p. 141; *Annual Digest*, 1948, Case No. 197), decided in 1948 by the French Court of Orleans, may be mentioned as an example. This was an action by the French State to recover a number of metal wine vats which before the war were the property of the French Army and which after having been seized by the German occupation authorities were sold by them to the defendant company. The French State based its claim on the ground, *inter alia*, that the occupant, being only the usufructuary of the public property of the occupied State, whether movable or immovable, could not acquire ownership in it. It was also urged that the wine vats, being a permanent fixture attached to immovable property, were, by virtue of French law, to be regarded themselves as immovable property and as such governed in any case by the specific provision of Article 55 of Hague Convention No. IV according to which the occupant is only the administrator and usufructuary of the immovable property belonging to the occupied State. The Court found against the French State. In particular, it held that the conception of *immovables par destination* could not be applied to the interpretation of the Hague Convention and that Germany had validly acquired title over movable property belonging to France. The issue of the illegality of the war and of the propriety of a French subject acquiring, in a war of that description, property of which his State has been divested by the aggressor, was not raised.

² As in the case of *Soubrouillard v. Kilbourg*, where the French Court of Cassation held that although international law recognizes the right of the army of occupation to make requisitions for its military requirements, it does not give the civil authorities of the enemy the right to transfer to private individuals ownership in goods obtained by a levy on other private persons—even if compensation had been paid to the original owner and even if the subsequent transfer was accomplished for the purpose of regulating the economic life of the occupied territory (*Gazette du Palais*, 1946 (2^e sem.), p. 90; *ibid.*, 1948 (2^e sem.), p. 163; *Annual Digest*, 1948, Case No. 180). See also, for a similar decision, *Delville v. Servais*, decided in 1945 by the Court of Appeal of Liège (*Pasicrisie Belge*, 1945, ii, p. 43; *Annual Digest*, 1943–5, Case No. 157).

the Allied Governments in the Peace Treaties of 1947. The Peace Treaty with Italy—an aggressor State—merely provided for the revision of decisions and orders of Italian prize courts which were not in conformity with international law.¹ A similar attitude seems to have been adopted with regard to appropriation of property, public and private, on land. The warning referred to above and contained in the London Declaration of 1943² was apparently intended to cover only such acts of dispossession as were contrary to international law. It applied 'whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected'. There seems to have been no intention to declare such acquisitions and transfers to be illegal on account of the unlawfulness of the war waged by Germany and her allies. Thus the various authorities of the Allies held on a number of occasions that booty and other property acquired by German forces validly transferred title to Germany—occasionally with the incidental result that such property subsequently recaptured by the Allies from Germany in turn transferred title to the Allies, so that the title of the original owners was deemed to be extinguished.³

Another possible instance of the application—both before and during the war—of the principle that an aggressor cannot derive rights from his illegal conduct may be mentioned in this connexion. Thus it has been suggested that that principle may be properly resorted to in relation to the rule that some treaties are abrogated as between belligerents as the result of the outbreak of war. Can the guilty belligerent and its nationals rely on that rule in order to render inoperative, as against them, the provisions of the treaty? It does not appear that courts have so far been prepared to consider—or that they have been invited by the parties to consider—that question from this point of view.⁴

¹ Annex XVII (A) to the Italian Peace Treaty. The provisions were limited to nationals of the United Nations.

² See above, p. 225.

³ For some examples see Downey in *American Journal of International Law*, 44 (1950), pp. 488–504. See also Smith in this *Year Book*, 23 (1946), pp. 227–38, who reproduces an Order issued by the 21st Army Group in 1944 upon the question of booty. The Order laid down that all movable property the title in which had passed to the Germans under international law was to become the property of the State whose armed forces had taken possession of it, whether on the battlefield or subsequently. In *Vitse v. Brasser and the Dutch State*, decided in 1948, the Netherlands District Court of Middelburg held that a tractor requisitioned by German forces in France against delivery of a receipt and subsequently abandoned by them, captured by the Dutch forces and sold by them to Brasser, was the property of the latter (*Annual Digest*, 1948, Case No. 200). The Court held that as the requisition was effected in accordance with Article 52 of the Hague Regulations in the matter of requisitions, it was not covered by a French Decree of 1945 which declared null and void all acts of spoliation by the enemy. See also the decisions of the Italian Court of Cassation in *Tanfani v. Cartelli* (*Foro Italiano*, 72 (1949), i, p. 334) and *Colorni v. Ministry of War* (*ibid.* 73 (1950), i, p. 829).

⁴ See the observations of Professor Scelle on the judgment given in 1949 by the French Court of Cassation in the case of *Lovera v. Rimaldi* (*Clunet*, 77 (1950), pp. 72–82). See also Article 5 of the *Harvard Research Draft of 1939 on Rights and Duties of States in Case of Aggression*, which lays down that 'by becoming an aggressor, a State loses the right to require other States to perform

In view of the attitude of the courts and of belligerent Governments, there is room for a further examination of this aspect of the question. Apart from the main difficulty, in the existing state of international organization, of determining the illegality of the war in any particular case, there seem to exist weighty objections to setting aside the normal operation of rules of warfare with regard to acquisition of title. Any legal theory which denies to the aggressor, even within the limited sphere of title to property, the rights usually associated with the conduct of war may act as an inducement for him to depart from the obligations imposed by that part of the law of war. If no act of requisition, however fully in accordance with the Hague and Geneva Conventions, can secure for him legal title, why should he take the trouble to abide by the legal rules in question? The same applies to his treatment of public enemy property of which, in the contemplation of the Hague Conventions, he is merely the usufructuary. This is also the position with regard to the procedural and substantive safeguards of the law of prize.

The argument implied in these questions is not altogether convincing. For a belligerent will not necessarily permit his conduct to be determined by consideration of the standard which foreign courts and authorities—largely on the hypothesis that he will be defeated—may apply to his acts. Nevertheless, the argument has some force. A belligerent's conduct is influenced not only by his own sense of legality, but also by the judgment of others. If that judgment attaches the stigma of illegality to all his acts, he may justifiably incline to some laxity in the observance of the law. In so far as the Hague Convention attempts a measure of orderliness in the matter, by establishing in Article 53 and elsewhere distinctions between property which is subject to seizure, appropriation, requisition, sequestration, control, and so forth, such attempts are in danger of being frustrated by the introduction of the rule of the absolute invalidity of all title claimed to have been acquired by the aggressor. Moreover, in so far as motives of humanity urge the applicability of rules of war equally to both belligerents, it is possible that these considerations apply also to a large extent to rules connected with the acquisition of title to property. For in many cases the law in question is designed to protect the individual and the economic life of the occupied territory from the hardships and exactions of war. It is significant that the provisions of the Geneva Convention of 1949 relating to the treatment of property in occupied territory¹ are no less detailed than those of the Hague Conventions. On occasions, it may be noted,

the obligations of executory treaties, but is not relieved of the duty to perform the obligations of such treaties'. It will be noted that the proposed Article is intended to apply also to the relations of the aggressor with neutral States—with the result that those States, although remaining neutral, may participate in such sanctions against the aggressor as involve disregard of any relevant treaties.

¹ See Articles 55 and 57 of the Protection of Civilians Convention.

requisitioning of goods may be in the interest of the population in occupied territory, for instance, when the occupant deems it necessary to resort to requisitioning for the purpose of preventing hoarding and illicit trade in scarce goods.¹ Finally, to the extent to which recapture of goods by a belligerent is as a rule deemed to vest title in him, questions of some complexity may arise, as the result of the rule of absolute invalidity of the title of the aggressor, if the goods are recaptured; military and other courts near the field of battle and elsewhere may have to investigate, with a view to restoration, the title of the original owner.

Above all, it is important to bear in mind the narrow scope, even within this limited sphere, of the possible application of the logical rule of the invalidity of the acts of the aggressor. It is not a rule which can be applied by the courts of the guilty belligerent during or even probably after the war. Nor—consistently with obligations of neutrality and having regard to the possibility of immediate retaliation—can it be acted upon during the war by the courts of a neutral State. These cannot properly charge themselves, while the war is in progress, with determining which belligerent side is the aggressor. Admittedly, as stated, the rule in question may be applied by the courts of the opponents of aggression. As both sides will probably proclaim themselves to be engaged in war in that capacity, that rule must unavoidably act in the direction of a denial of all law. For these reasons² there is force in the view that any denial of title to the guilty belligerent may be left not to judicial deduction, however sound, from existing principle and from the overriding fact of the illegality of the war on the part of the aggressor, but to a political decision expressed in the treaty of peace or in the instrument of surrender imposed upon the defeated aggressor or to legislation passed by the victor. Admittedly, the principle that the aggressor State does not acquire title is capable of application *after* the war by formerly neutral courts in relation to the defeated belligerent whom they consider to have been the aggressor—although they may not be in a position to apply that principle in relation to the victorious aggressor. However, in view of the narrow confines, thus demonstrated, of the application of the rule of invalidity of the title acquired by the aggressor, it must be a matter for consideration whether, having regard to the risks and inconveniences of its judicial application, it ought to be applied by courts at all. They have

¹ See for examples of requisitioning in the interest of the population *Soubrouillard v. Kilbourg* (*Annual Digest*, 1948, Case No. 180), though in that case the French Court of Cassation declined to recognize the validity of a requisition for the purpose of regulating the economic life of the population. See above, p. 229, n. 2. And see *Commune di Capaccio v. Lombardi*, decided in 1950 by the Italian Court of Cassation (*Foro Italiano*, 73 (1950), i, p. 1281).

² On the other hand, there is probably little substance in such arguments as that the rule invalidating title acquired by the aggressor is not of sufficient potency to act as a deterrent against aggression or that its application, in so far as it may result in restoration of the property, may on occasions retard the economic recovery of the aggressor.

so far declined to do so. It is probable, having regard to the considerations adduced above, that the existing law as thus acted upon by courts, is the better law. The fact that a war of aggression—including resistance thereto—is being waged on a large scale signifies a temporary breakdown in the international legal order. There must be reluctance to augment the evil by encouraging the abandonment of the normal consequences of the law of war in this—or other—spheres.

IV

*Consequences of the illegality of the war apart from the
conduct of hostilities*

Reasons have been given in the preceding sections why, *so long as the hostilities last*, the fact of the illegality of the war undertaken by a party to the struggle in violation of its fundamental undertakings is irrelevant, *in the relations of the belligerents*, to the question of the applicability of rules of warfare *in matters relating to the conduct of hostilities*. The italicized passages point to the qualifications of the view that the illegality of the war has no effect on the operation of the rules of war. Moreover, the illegality of the war has a bearing upon certain traditional rules of international law which, although not constituting rules of warfare proper, are directly connected with the institution of war. These qualifications, however limited, of the view which contemplates the illegality of the war as irrelevant and which seems to some obnoxious and illogical, will now be considered.

After the cessation of hostilities there is room for the application of the principle that in certain spheres no rights and benefits can accrue to the aggressor from his illegality. Some of these consequences of illegality may appear to be somewhat theoretical; others may be of immediate and practical application. Thus it follows from the principle *ex injuria jus non oritur* that a peace treaty imposed by the victorious aggressor has no legal validity. This is so notwithstanding the rule of orthodox international law which disregards the vitiating effect of duress in the conclusion of treaties. For that rule can reasonably be held to apply only to a war which the victor is entitled to wage. So long as international law permitted resort to war as an instrument of national policy and as an undisputed prerogative of national sovereignty it was inevitable that it should countenance the validity of treaties imposed by the victor. That consideration does not apply, in relation to an aggressor, in a system of international law in which war no longer occupies that position—although it is a consideration which continues to be valid in relation to the State which has been the victim of aggression.¹ However, although of considerable interest from the point of

¹ This view was put forward by the author of this article in the fifth edition of vol. i of Oppenheim's *International Law* (1937, § 499). See also, to the same effect, Article 4 (3) of the *Harvard*

doctrine, that aspect of the matter is probably of little import in practice. It will cause no embarrassment to a victorious aggressor, who will either brush it aside with contempt or invoke in his aid that very rule by the simple device of describing himself as having been the object of the illegal war. To the actual victim of aggression it will afford little immediate comfort—though it may strengthen his position, morally and legally, when he is politically able to shake off some or all of the burdensome provisions of an imposed treaty of peace. It is also possible that neutral States and their courts, if they are politically capable of doing so, may draw the proper legal consequences from that particular qualification of the irrelevance of the illegality of the war.

Similar considerations apply to the question of the title which an aggressor purports to have acquired by conquest. So long as war was a permissible instrument of national policy, international law recognized title acquired by force—a mode of acquisition altogether alien to legal principle. The situation has altered as the result of the changes, indicated above, in the legal position of war.¹ However, the same reasons which limit, in practice, the consequences of the vitiating effect of duress in relation to treaties imposed by an aggressor, apply also to the invalidity of the title by conquest imposed in such circumstances—with the possible qualification that such conquest is open to the impact of the doctrine of non-recognition of title illegally acquired.

Thirdly, while international law sets no limit to the conditions of peace which the victor may exact from a defeated enemy, it has been customary not to compel the latter to pay compensation for damage arising out of operations connected with the lawful conduct of the war. That custom must henceforth be deemed to lack a juridical basis in the case of a war undertaken unlawfully.² The Treaty of Versailles foreshadowed the adoption of that principle. In Article 231 Germany accepted responsibility, for herself and her allies, 'for causing all the loss and damage to which the Allied and Associated Governments and the nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies'. In Article 232 she undertook to 'make compensation for all damage done to the civilian population of the Allied and Associated Powers

Research Draft on Rights and Duties of States in Case of Aggression (1939); Fitzmaurice in *Hague Academy, Recueil des Cours*, 73 (1948) (ii), pp. 355, 356; and the present writer's *Report on the Law of Treaties* (Article 12): International Law Commission, Doc. A/CN.4/63, March 1953. For a different view see Charles de Visscher, *Théories et réalités en droit international public* (1953), p. 300.

¹ See the submission to this effect by the writer of this article in the fifth edition of volume i of Oppenheim's *International Law* (1937, § 241a)—a view adopted in Article 4 (2) of the *Harvard Research Draft on Rights and Duties of States in Case of Aggression* (1939). See also Bentivoglio, *La 'debellatio' nel diritto internazionale* (1948), pp. 27-32.

² For an elaboration of this point of view see Fitzmaurice in *Hague Academy, Recueil des Cours*, 73 (1948) (ii), pp. 324-6.

and to their property during the period of belligerency of and as an Allied or Associated Power against Germany, by such aggression by land, by sea, and in general by all damage as defined' in the Treaty. At the time of the Treaty of Versailles—as well as in 1914 when Germany launched the First World War—the fundamental changes in the position of war had not yet taken place and to that extent aggressive war had not yet become an illegal or criminal act. However, in so far as the victors rightly assumed that the war had been one of aggression on the part of Germany, these provisions of the Treaty of Versailles must be regarded as having paved the way for the adoption of what seems the correct principle on the subject. The Peace Treaties of 1947 concluded after the Second World War only partly illuminate the problem. For although all of them, in the respective Preambles, charge the defeated States with having taken part in a war of aggression under the aegis of Germany, they adduce as a relevant factor the circumstance that those States had abandoned the criminal alliance in the final stages of the war. Moreover, there is in these treaties an element of differentiation in the treatment of the defeated aggressor States as well as, to some extent, an element of reparation. Thus in the Treaty with Italy reparation is provided for, in Article 74, in favour of Soviet Russia, though not of other Allies. Also, although the Treaty includes, in Article 76, an express renunciation by Italy of claims arising directly out of the war, there is no such express renunciation on the part of the Allied Powers. Finally, the Treaties provide for the right of the victor to seize, liquidate, and retain enemy property and to apply it for the satisfaction of the claims of the Allies and their nationals, including debts, under the Peace Treaties.¹ With regard to property of the Allies and their nationals in enemy territory, the Peace Treaties of 1947 provide for the full restoration of 'legal rights and interests' and for the return of other property. The differential treatment of the property of the victors and the defeated can properly be explained by the fact that, as stated in the Preamble to these Treaties, the defeated States bore the responsibility for taking part in the war of aggression.

The fact that it was the victorious States who applied this test, namely, participation in a war of aggression, after the two World Wars does not necessarily mean that it is a test altogether devoid of value. This is particularly the case seeing that the victors represented the overwhelming majority of States, so that their action can be conceived as being in the nature of enforcement of international law. Undoubtedly, the actual application of this test—as, indeed, of the other tests here examined—depends upon the success of the just cause and the defeat of aggression. That outcome, which is synonymous with the survival of international law, must be assumed. Without such an assumption the consideration of any question

¹ Article 79 of the Treaty with Italy.

of international law is unreal. This is so even though it may be urged that, if the aggressor emerges victorious, he will rely on the doctrine here propounded for his own purposes, namely, for penalizing the defeated victim of aggression by the aggressor's *ipse dixit* that the defeated State was the aggressor. In the nature of things there can be no reassuring answer to the question thus put. This is no reason for embarrassment. All law and all legal doctrine presuppose the victory of right. Should, in any general conflagration, physical force wholly alien to the principles of the Charter of the United Nations and of international law as we know it emerge triumphant, a new legal order (if it may be so termed)¹ dictated by the victor will arise. Juridical thinking can make no provision for that contingency. It is necessarily confined to the existing legal order and to the consequences flowing from it. Once these basic assumptions are granted, there is room for the adoption and application of principles which discourage lawlessness and penalize aggression. To what extent reparation—of a compensatory and penal nature—commensurate with the magnitude of the crime of aggressive war is economically feasible is outside the sphere of legal consideration. The fact that such reparation may not be fully practicable is not a sufficient reason for questioning the authority of the principle which underlies it.

The same considerations apply to yet another consequence of the illegality of aggressive war, namely, that the very act of initiating and waging war may, after the war, become the subject of a criminal charge and criminal responsibility. This, in fact, was one of the charges brought against the major war criminals in the trials of the Major War Criminals at Nuremberg and in the Far East. That consequence of the illegality of aggressive war must, in the nature of things, be limited to persons who are in a position of political leadership and thus bear the responsibility for the major decision to embark upon the war of aggression. For that reason no attempt was made in the indictments in the above-mentioned trials to draw the full logical conclusion from the fact of the illegality of the war, for instance, by an allegation that, because of such illegality, acts otherwise lawful—such as orders to kill combatants or to perform requisitions in accordance with the Hague Conventions—became criminal.² On the contrary, the indictments were limited (apart from the major charge of initiating and waging a war of aggression) to charges of war crimes proper, i.e. of violations of the law of war and, in some cases, of crimes against humanity. The practice thus adopted must be regarded as consistent with the principle that, during a war, the illegality of the war does not affect the continued operation of

¹ See the following statement in Professor Brierly's *The Outlook for International Law* (1944), p. 74; 'Hitler could probably have given order, or at any rate order of a sort, to Europe, if his plans had not been interfered with, but he would never have given it law.'

² See above, p. 217, n. 4.

rules of warfare bearing upon the conduct of hostilities. That principle would become to a large extent unreal if after the war acts performed in accordance with rules of warfare were to be treated, retrospectively, as illegal and criminal.

V

The law of neutrality

The present article is concerned with the operation of rules of warfare as between the belligerents. It is therefore not proposed to discuss here in any detail the effects of the illegality of a war on the relations between the belligerents and neutrals. In a sense it is in that sphere that, even during the war, there may be room—in law—for drawing the requisite consequences from the fact that the war is illegal on the part of one belligerent or set of belligerents. For the principal explanation and justification of the modern law of neutrality, conceived as an attitude of absolute impartiality, has now disappeared. That explanation consisted in the fact that, until the First World War, the right to wage war constituted an unlimited prerogative right of sovereign States; no neutral State, therefore, could arrogate to itself the right to pass judgment on the legality of a war and to shape its conduct accordingly. The question simply did not arise. In this respect the position has undergone a fundamental change. The unlimited right of war is no longer a prerogative of the sovereign State. International law now recognizes that a State may act unlawfully by the very act of declaring or going to war. It admits the distinction between wars which are lawful and those which are not. To that extent it has re-established the historic foundation of qualified—discriminatory and discriminating—neutrality.

Moreover, in so far as the prohibition or limitation of the right of war has been combined with the establishment of a system of collective security and collective enforcement of peace—as in the Covenant of the League of Nations or the Charter of the United Nations—the right of a neutral to discriminate against and to penalize an aggressor has been transformed into a duty. That duty may assume the complexion of the supreme obligation to abandon the neutral status itself. It may, however, be compatible with the retention of neutral status in all cases in which the system of collective security so permits and in which an aggressor does not elect to add to his original unlawful act the further illegality of treating as a belligerent a neutral State which discriminates against him. These contingencies need not be examined here.¹ The position admits of little doubt in cases in which

¹ The question of neutrality under the Charter of the United Nations is examined by the present writer in his seventh edition of volume ii of Oppenheim's *International Law* (1952), §§ 292c-292i.

a valid determination of aggression has taken place in accordance with the Charter. In such cases, to the duty of the Members of the United Nations to abandon neutrality or impartial neutral conduct there corresponds the right of the United Nations and of States engaged in hostilities in pursuance of such determination to exact from other States a line of conduct regardless of the traditional law of neutrality.

On the other hand, there must be borne in mind that explanation of the principle of absolute neutrality which is partly legal and partly political, and which has not been decisively affected by the new developments. That explanation is that a belligerent cannot be expected to submit, without retaliation, to discriminatory measures on the part of a neutral. The relation between a neutral and a belligerent implies a reciprocity of rights and duties; it demands forbearance and limitation of freedom of action on both sides. It is clear, therefore, that a belligerent against whom discrimination is practised and against whom a neutral State or States presume to exercise judgment will—so far as lies in his power—oppose any such departure from an attitude of impartiality. In practice the solution will be determined by the relative strengths of the belligerent and the neutral concerned. A weak neutral whose territory borders on that of a powerful belligerent will hardly be able to afford practical adherence to a principle which authorizes or enjoins him to discriminate against the aggressor and which exposes him to the danger of reprisals and invasion. A powerful neutral, especially if his territory is separated from that of the belligerent, will be able to draw the full consequences from his right—and, in a system of collective security, his duty—to exercise judgment in the matter of the legality of the war waged by the belligerents, and to translate his judgment into practice. The second period of neutrality of the United States prior to its entry into the Second World War provides a clear example of that possibility in the case of a neutral not bound by the obligations of a collective system for enforcing the peace. In pursuance both of what it conceived to be its vital national interest and of its rights and obligations under international law, the United States, in the year preceding its entry into the war, adopted against Germany a policy of discrimination which expressed itself in various forms of assistance falling short of direct military participation in the war, to Great Britain and her allies. But it was only after a long succession of such acts of assistance and only in conjunction with the extraneous factor of the entry of Japan into the war that Germany declared war upon the United States. In relation to a less formidable neutral such a pronounced departure from an attitude of impartiality would have been met by the utmost resistance, in the form of reprisals and war.

Moreover, any obligation to discriminate against a belligerent accused of waging an illegal war must be affected by the circumstance, referred to

above at some length, that no binding determination of aggression has taken place. While in such cases third States may validly exercise their judgment as to the merits of the case and, on the assumption that they are politically in a position to do so, discriminate against whom they consider to be the aggressor, they are not legally bound to do so. This is so although the principle of good faith would seem to require that, in the face of an overwhelming consensus of opinion—as, for instance, in the case of a valid recommendation adopted by more than two-thirds of the Members of the United Nations—they are not at liberty to attach in every respect decisive importance to the failure of the Security Council to determine the fact of aggression.¹

VI

Conclusions

The conclusions of this article may be briefly stated as follows:

(1) The principle, however well-founded in juridical logic, that an aggressor, i.e. a State which has embarked upon war in violation of a basic prohibition of international law, cannot invoke for its benefit the rules of warfare does not apply, *durante bello*, to the actual conduct of hostilities and, generally, to the mutual relations of belligerents.

(2) Neither judicial authority nor, to any substantial extent, the practice of Governments support the proposition that a State waging an unlawful war does not obtain or validly transmit title with respect to property acquired in connexion with the conduct of war and in accordance with international law. This is so regardless of whether such title is acquired in accordance with the law of war or not. Conflicting considerations of principle apply to this question, and no clear rule, *de lege ferenda*, can be laid down in this respect.

(3) There is room in other spheres, not directly connected with the conduct of war, for giving effect to the principle that a State cannot acquire rights from its wrongful acts. In particular, a State waging an unlawful war is not entitled, after the war, to invoke rules of customary international law which disregard the vitiating effect of duress in the conclusion of treaties; which recognize title acquired by conquest; which absolve the belligerent from reparation for damage caused by lawful acts of warfare; which give it the right to regard as dissolved treaties concluded prior to the outbreak of the war; and which render it—and the individuals responsible for its actions—immune from criminal responsibility for the initiation of a war of aggression.

¹ For an analysis of the relation of international action to neutrality see Taubenfeld in *American Journal of International Law*, 47 (1953), pp. 397-414.

(4) In general, it is open to and in proper cases incumbent upon neutral States, especially if bound by the obligations of a system of collective security, to discriminate against a State which has been authoritatively declared to be guilty of aggression. The practical importance of the latter principle is narrowly circumscribed by the fact, which may be relied upon within the limits of good faith, that its operation is contingent upon a binding determination of aggression. Nevertheless, the requirement of mutually binding obligations as between belligerent and neutral is not without legal relevance.

These conclusions seem to be both inconclusive and unsatisfactory from the point of view of wider principle. On the crucial issue of the applicability of rules of warfare directly bearing on the conduct of hostilities, they appear to leave totally out of account the fact of the illegality of a war. The same applies to the question of the invalidity of title acquired by an aggressor—a question of relatively narrow compass. In so far as the conclusions here advanced consider the fact of the illegality of a war to be relevant, they bear on matters connected with the liquidation of the war rather than with its conduct. All this affords, on the face of it, little cause for satisfaction. However, the phenomenon of war does not fully admit of treatment in accordance with canons of logic. Banished as a legal institution, war now remains an event calling for legal regulation for the sake of humanity and the dignity of man. Legal regulation is also required to safeguard the possibility of some measure of voluntary collaboration between the belligerents after the war. At the same time, these considerations are not inconsistent with giving effect, within a limited sphere and largely after the war, to the principle that an unlawful act ought not to become a source of benefit and title to the wrongdoer. The application of that principle within that narrow sphere touches only the fringe of the problem. That irreducible minimum of conformity with the fundamental change in the legal place of war in international society has wider implications and, although of limited compass, cannot be disregarded without grave peril to the authority of international law and to the ultimate effectiveness of that fundamental change itself.

Undoubtedly, this dualism of considerations is baffling and confusing. It has baffled the science of international law from its very inception. Grotius hesitated inconclusively between disregarding, in deference to the dictates of humanity, the fact of illegality of war on the part of an aggressor¹ and drawing far-reaching consequences from the distinction between *bellum justum* and *bellum injustum*.² Others have done so in the past and will

¹ *De jure belli ac pacis*, Book III, ch. iv, § iv.

² Book II, ch. xv, § xiii. 1; ch. xxv, § iv; Book III, ch. x, § iii. 1; ch. i, § v. 3; Book II, ch. ii, § xiii. 1; § xiii. 4. Moreover, Grotius was prepared to apply this principle to the sphere of municipal law. He asserted, in emphatic language, that the subject when called upon to take up arms in

continue to do so in the future.¹ But the very fact of such hesitation does credit to the science of international law. There is no room for clear-cut solutions in a situation analogous to a revolution within the State. For in a system of international law in which war is prohibited, recourse to war is in the nature of a revolution against the basic law of the international community. The fact of revolution and of action aiming at its suppression calls for some temporary relaxation of the apparent inexorabilities of the law. While the contest is in progress juridical logic must not be allowed to add to the cruelties and sufferings of battle; nor must it be permitted to result in the dissolution of all bounds of legal restraint. As soon as, in terms of practical relevance and urgency as distinguished from mere doctrinal interest, the problem arises as to the applicability of rules of war in what is termed international police action, there is in fact no longer any question of police action in the ordinary sense. The situation is one of a contest prolonged in duration and possibly precarious in its progress and outcome—and these are the characteristics and concomitants of war. The resulting

an unjust war ought to abstain from doing so: Book II, ch. xxvi, § iii. 1. The same, he says after a careful consideration of the dangers of disobedience, applies to cases where the justice of the war is doubtful: *ibid.*, § iv. 5, 8. With this there may be compared some judgments given by German courts after the Second World War. Thus in 1947 the *Oberlandesgericht* of Kiel sentenced to a term of imprisonment a former member of the German armed forces, an opponent of the National-Socialist régime, who had been condemned to death in 1944 for desertion and who, after having escaped, was recaptured and, in an attempt to escape once more, injured a police officer who had apprehended him. The accused pleaded that as the war was illegal on the part of Germany, his desertion and his further acts of resistance were justified. The Court examined in detail the question—which in the case before it was probably irrelevant—whether rules of warfare apply in an illegal war. It gave an affirmative answer to that question. In so far as the accused invoked the fact of the illegality of the war as a justification for his refusal to obey the orders of the then German Government, the Court was content to apply the controversial doctrine that rules of international law apply to States only. The judgment, which rejects the view propounded by Grotius that the individual is entitled to refuse obedience to his State in a war of aggression and which challenges expressly and by implication the principles of the Charter and the Judgment of the International Military Tribunal at Nuremberg, provides an interesting example of the attitude of some German courts (*In re Garbe: Annual Digest*, 1948, Case No. 122; *Süddeutsche Juristenzeitung*, 2 (1947), cols. 324–40). But see *ibid.*, cols. 331–7, for a powerful criticism by Arndt of the judgment of the Court. And see *ibid.*, cols. 520, 521, for a similar judgment of the *Oberlandesgericht* of Dresden, given in 1947, where the Court, while holding that in principle the laws of war applied in relation to the war waged by National-Socialist Germany, held that the accused was responsible for executing an order involving devastation which was not in fact justified by military necessity (also reported in *Annual Digest*, 1948, Case No. 125, *sub nom. General Devastation (Germany) Case*).

¹ Of this Professor Guggenheim's treatment of the subject provides an interesting example ('La validité et la nullité des actes juridiques internationaux', in *Hague Academy, Recueil des Cours*, 74 (1949) (i), p. 230). He expresses the view that 'aussi bien l'Etat attaqué que les Etats tiers, éventuellement neutres, sont obligés d'accorder à l'Etat agresseur le traitement prévu par les lois et coutumes de la guerre'. He relies on Grotius as an authority for the proposition that a war of aggression is not a mere nullity (Book III, ch. iv, § 4). But he invokes the 'doctrine grotienne' in support of the view—which has found acceptance in the Second World War and in American practice—that a war of aggression 'n'obtient qu'une reconnaissance restreinte en droit international' and that neutral States are entitled to discriminate against an aggressor. In his *Lehrbuch des Völkerrechts* (1950), p. 779, however, Professor Guggenheim adopts without qualification the view that the law of war knows no distinction between the aggressor and the victim of aggression.

situation is a clear indication of the fact that organized international society has failed not only to prevent hostilities but also to ensure that swift and overwhelming suppression of the insurrection against the international order which alone can qualify it as police action in the ordinary sense of that term. It must be a matter for reflection whether to that calamity there ought to be added that of the total abandonment of the restraints of the law of war. For such is likely to be the result of the claim on the part of one belligerent side to be entitled to jettison some of them and to retain others at his option.

There is a distinct element of artificiality and over-simplification in the suggestion, which has been frequently made in this connexion in the course of hostilities in Korea, that the forces of the United Nations should be entitled to all the rights of war but should not be bound by all of them. Such statements assume that, by dint of the simple device of referring to the contest as international police action or collective action for the enforcement of the Charter, it is possible to act consistently on the theory that the hostilities do not in fact constitute a war between equally matched opponents. What belligerent, unless he has already been defeated or unless, in desperate resignation, he expects defeat, will tolerate, without resorting to immediate retaliation, the conduct of an enemy who claims to dictate the rules of the contest—selecting those which suit him and rejecting others? These considerations are relevant to statements of the law, of the kind propounded by Professor Quincy Wright, that in matters such as occupation of enemy territory, destruction of his armed forces, exercise of belligerent rights at sea, appropriation of enemy property, and punishment of espionage and war treason, 'the aggressor enjoys none of these powers, but states engaged in defense or enforcement may exercise all of them in so far as military necessities require'.¹ However, it is expressive of the practical implications of this and similar views that the learned author, after a judicious examination of the question, arrives at the conclusion that 'the difference between the legal position of the aggressor and that of the defender may often be made effective only in respect to claims for reparation or liabilities for criminal prosecution after hostilities'.² He suggests further exceptions to the rule thus attenuated.

The same considerations apply to a report formulated on this subject in 1952 by a body of lawyers in the United States in answer to the question whether the laws of war should apply to United Nations enforcement action. The report concluded that 'in the present circumstances' and 'for the time being . . . the United Nations should not feel bound by all the laws of war, but should select such of the laws of war as may seem to fit its purposes (e.g. prisoners of war, belligerent occupation), adding such others as

¹ *American Journal of International Law*, 47 (1953), p. 374.

² *Ibid.*, p. 376.

may be needed, and rejecting those which seem incompatible with its purposes.¹ It is not easy to visualize hostilities in which the rules governing their conduct are determined by one side and in which that side abides by rules which suit it, adds others which it finds useful, and rejects those which hinder the accomplishment of its purpose. Obviously, the States engaged in a war waged as a measure of collective enforcement of the law may deem themselves—as may also their opponents, especially if they, too, consider or pretend to consider that they are resisting aggression—called upon to set aside the laws of war. This they may do, not because these laws have ceased to be binding but because they are resolved, in the fulfilment of the supreme duty of vindicating the reign of law, to take upon themselves the responsibility for abandoning that particular part of international law and for throwing into the scales of battle the whole weight of unrestrained force. These possibilities cannot be contained within the framework of a legal rule or doctrine. Should the restraints of the law of war be thrown overboard—and they cannot probably be discarded only in part at the option of one belligerent—this will be the result not of any inescapable dynamics of legal principle but of forces of a different, though not necessarily inferior, order.

¹ Report by Messrs. Bivens, Goodrich, Kelsen, Kunz, Sohn, and Eagleton (a Committee appointed by the American Society of International Law to consider the question whether the laws of war should apply to United Nations enforcement action): *Proceedings of the American Society of International Law*, 1952, p. 216, at p. 220. See, on the other hand, the penetrating analysis of Major Baxter, *ibid.* 1953, pp. 90-99.

PLURAL NATIONALITY AND CITIZENSHIP WITH SPECIAL REFERENCE TO THE COMMONWEALTH

By CLIVE PARRY, M.A., LL.B.

I. *Introductory*

IN *Von Zedtwitz v. Sutherland*, Chief Judge Martin, of the United States Court of Appeals for the District of Columbia, declared 'dual citizenship [to be] an incongruous relationship unknown to our institutions', and added, anent the United States legislation for the disposal of enemy property, that '... within the proper and ordinary sense of the language employed in the act as amended, a person cannot rightly be said to be a citizen or subject of a country other than Germany, when at the same time he is a citizen or subject of Germany'.¹ In *Kramer v. A.-G.*, Younger L.J. said, with respect to similar legislation in the United Kingdom, 'such an enactment, dealing with the property in this country of persons described merely as German nationals cannot without wide words of extended interpretation be construed as touching the property of a British subject. . . . In this country, and for such a purpose, the two descriptions are mutually exclusive'.² The first of these judicial statements has been described by Sir Arnold McNair as 'difficult to understand'.³ The second formed part of a dissenting judgment in the Court of Appeal in a case which subsequently came before the House of Lords,⁴ where the opinion of the majority was upheld. It was in any case qualified by the following words: 'I have not of course been forgetful in this judgment of s. 14 of the British Nationality Act, 1914, and of the exceptional facility with which by making a declaration of alienage persons in the position of the appellant and others may cease to be British subjects. [But] before such declaration has been made—and it cannot be made at all in time of war—the status of such a person as the appellant in no way differs from that of any ordinary British subject.'⁵ *Kramer's* case arose out of exceptional legislation. But an unqualified endorsement of what Younger L.J. therein described as 'an essential principle of English law on which I have been insisting—namely, that a person cannot at once be a British subject and a German national',⁶ is to be found in a wholly different type of case—one relating to the dissolution of the union of the Crowns of the United Kingdom and Hanover. For in *In re Stepney Election Petition*, *Isaacson v. Durant*, Lord Coleridge C.J. said:

¹ (1928), 26 F. (2d) 525, 527; *Annual Digest and Reports of Public International Law Cases*, 1929-30, Case No. 159.

³ *Legal Effects of War*, 3rd ed. (1948), p. 24, n. 3.

⁵ [1922] 2 Ch. 850, at p. 878.

² [1922] 2 Ch. 850, at p. 878.

⁴ [1923] A.C. 528.

⁶ *Ibid.*, at pp. 878-9.

'But that a man rightfully and legally in the allegiance of one sovereign could be also rightfully and legally treated as a traitor by another, cannot be the law.'¹ This proposition was in effect the *ratio* of the decision in the case, to the effect that Hanoverians were aliens after the dissolution of the Union in 1837: they could not be double nationals.

The statements cited could be described as misconceived, or as true only from a very restricted point of view. For it is clear that plural nationality has for a long time been familiar to the administrative authorities—and the courts—of the United Kingdom. They, in common with other Governments, have, in Dr. Mervyn Jones's phrase, 'become resigned to it'.² It was thus given statutory recognition, as was appreciated in *Kramer's* case, in s. 14 of what used to be the British Nationality and Status of Aliens Act, 1914.³ Whatever was the attitude of the common law, that provision was but a re-enactment of s. 4 of the Naturalization Act, 1870.⁴ But it is perhaps one thing to say, as those enactments did, that a person who is a British subject and also a national of another State may, if he wishes, cease to be a British subject, and quite another to say that there is in any other respect any difference between one sort of British subject who has no other nationality and another sort who has. Certainly there are difficulties in the way of holding that the courts of the United Kingdom have any general conception of foreign nationality, as distinct from alienage, or can ordinarily distinguish within the category of aliens between one sort of foreign national and another. Possibly the statements cited imply no more than this.

In any event, *Kramer's* case seems to be the only modern decision in which the nature of double nationality was considered by an English court. But the case of *Murray v. Parkes*⁵ merits consideration in this connexion. There what was in question was the status of a person who was indisputably a British subject, but who also claimed to be a citizen of Eire. It arose before the enactment of the Ireland Act, 1949, with its remarkable provision that 'notwithstanding that the Republic of Ireland is not part of His Majesty's dominions, the Republic of Ireland is not a foreign country for the purposes of any law in force in . . . the United Kingdom'.⁶ Nevertheless, in *Murray v. Parkes* the Court of Criminal Appeal canvassed the question what would be the status of such a person if Eire did cease to be part of the dominions of the Crown, and, in consonance with the decision in *Isaacson v. Durant*, reached the conclusion that if he were resident in Eire at the relevant time, he would cease to be a British subject. But when by

¹ (1886), 17 Q.B.D. 54, at p. 63.

² *British Nationality* (1947), p. 23.

³ 4 and 5 Geo. V, c. 17; see below, p. 274. The unrepealed portions of this enactment are now to be cited as the Status of Aliens Act: see the British Nationality Act, 1948, 11 and 12 Geo. VI, c. 56, s. 34, and Fourth Schedule, Part IV.

⁴ 33 and 34 Vict., c. 102; see below, p. 274.

⁵ [1942] 2 K.B. 123.

⁶ 12 and 13 Geo. VI, c. 41, s. 2 (1).

enactment it was 'recognized and declared that the part of Ireland heretofore known as Eire ceased . . . to be part of His Majesty's dominions',¹ it was also provided, as has been seen, that the region was not to be regarded as a foreign country. And it had previously been provided by the British Nationality Act, 1948, that the law of the United Kingdom and Colonies should in general 'continue to have effect in relation to citizens of Eire . . . as it has effect in relation to British subjects'.²

The provision last quoted does more than imply that, even before the Ireland Act, 1949, citizens of Eire were not, *as such*, British subjects. It is perhaps doubtful whether that and other provisions of the British Nationality Act in fact produced the result that, after their enactment, citizenship of Eire was a foreign nationality, as distinct from a mere 'national character' . . . within the wider British nationality' such as it had been at the time of the decision in *Murray v. Parkes*.³ The doubt arises first on the wording of the statute, which is inept.⁴ But, even assuming that Parliament succeeded in implementing its intentions, the further question arises whether, to provide that Ireland is not to be treated as a foreign country and that Irish citizens are to be treated as British subjects, is not to negative the effect of providing that Ireland is not part of the dominions of the Crown and that her citizens are not British subjects. The explanation may be that externally or internationally a complete separation has been achieved, but that internally it has not. That is what was obviously intended. It remains to be seen whether it was a possible aim. And in this connexion the apparent diversity of earlier opinion as to the possibility of plural nationality is directly relevant.

Approaching the same question from the opposite point of view, it may be said that it was clearly the intent of Parliament in the case of certain other territories, that is to say, approximately what were formerly called the self-governing Dominions and which may now conveniently be called the Commonwealth countries, to provide for a less complete separation than in the case of Ireland. There was therefore no enactment that such territories should cease to be part of the dominions of the Crown, but a provision that 'Every person who . . . under any enactment for the time being in force

¹ 12 and 13 Geo. VI, c. 41, s. 1 (1).

² S. 3 (2); see also the Ireland Act, 1949, s. 3.

³ [1942] 2 K.B. 123, at p. 131 (*per* Viscount Caldecote C.J.).

⁴ The wording of s. 1 (1) of the Act of 1948 (set out below) carries no necessary implication that a person cannot be a British subject by virtue of some status other than citizenship of the United Kingdom and Colonies or of another country of the Commonwealth. Indeed, it could not properly have done so in view of the further provision in s. 13 for the statutory class of British subjects without citizenship. But the result is to leave open the possibility that a person may yet be a British subject at common law notwithstanding that he does not become a statutory British subject. The possibility is not lessened by the provision in s. 2 that any citizen of Eire who was before 1949 also a British subject 'shall not by reason of anything contained in section one of this Act be deemed to have ceased to be a British subject' if he executes a claim of retention in statutory form. For there is nothing in s. 1 to cause such a person to cease to be a British subject.

[in either the United Kingdom and Colonies or in any Commonwealth country] is a citizen of that country, shall by virtue of that citizenship have the status of a British subject'.¹ This was enacted as part of a general reorganization of what is commonly called the law of British nationality, and this 'common clause' was expected to be adopted not only in the United Kingdom, but also in each Commonwealth country.² The intention is clear: that henceforth the term British subject, with which is equated the new and possibly more acceptable expression 'Commonwealth citizen',³ should embrace citizenship of every community of the Commonwealth, and that no person should be a British subject or Commonwealth citizen save in virtue of his local citizenship. But here again it may be doubted whether the intention has been achieved. For, again, the Act is inexactly worded: there is no precise provision and only an obvious innuendo that British subjects at common law or by earlier statutes now cease to be.⁴ What is more important, it is arguable that the effect of the enactment has been to do just what was apparently not intended: to erect local citizenship into nationality and to make different categories of British subjects aliens to each other in all but municipal, and mutable, law.

The citizenship scheme raises, too, other problems, particularly problems of a practical character. For to give, as is given in some cases, to any citizen of the United Kingdom and Colonies not a citizen of another part of the Commonwealth the indefeasible right to become such, involves for the persons concerned extensive and sometimes difficult research in systems of law foreign to the several parts of the United Kingdom in the conflicts of law sense. Similar problems are involved in the concession⁵ of the liberty to any citizen of the United Kingdom and Colonies, who is also either a citizen of some one or more of the Commonwealth countries or a foreign national, to cease to be a United Kingdom citizen by renunciation. With regard to persons who, besides being British subjects, were also foreign nationals, this problem has of course existed since 1870, when the doctrine *nemo potest exuere patriam* was abandoned. But the introduction of the citizenship scheme, and the consequent abandonment of much of the former doctrine of the 'common status' of British subjects, has increased the frequency with which it will arise. So also has the introduction⁶ of the

¹ British Nationality Act, 1948, s. 1 (1).

² Cf. *British Nationality Bill, 1948, Summary of Main Provisions*, Cmd. 7326 (1948), para. 8. In fact, the 'common clause' has not been adopted in either South Africa or Pakistan, though a citizen of the United Kingdom and Colonies or of any other country of the Commonwealth is not within the definition of an 'alien' adopted by the laws of these two countries: South Africa Citizenship Act, 1949 (No. 44), s. 1 (1) (i); Pakistan Citizenship Act, 1951 (No. 11), s. 15. As to India, see below, p. 289.

³ British Nationality Act, 1948, s. 1 (2).

⁴ See above, p. 246, n. 4.

⁵ British Nationality Act, 1948, s. 19.

⁶ This follows from the repeal of the British Nationality and Status of Aliens Act, 1914, s. 13.

principle that acquisition of a foreign nationality by naturalization shall not produce any automatic loss of status as a British subject. In short, double citizenship has been added to double nationality, and the incidence of the latter has been greatly increased. It is the purpose of this article to examine the principal theoretical and practical problems created by this situation.

II. *Nationality in municipal law in general*

Nationality, considered as a legal concept, developed within the sphere of municipal, rather than international, law. Yet, perhaps curiously, nationality is not a necessary concept of any particular system of municipal law. It is not essential to the legal nature of a State that there should exist any definition of its citizens. Ancient States cannot always have differentiated between citizen and stranger.¹ Even today there are or may be States without any nationality law, though admittedly this usually arises only during a temporary phase in the early life of a new State.² Ideally, a State might offer its social benefits³ to all-comers and so regulate the incidence of its social burdens as to provoke no protests from abroad as to its failure to distinguish between nationals and non-nationals. But this ideal has been approached in practice only when there has existed a world State or where a State has had in effect no international relations. Thus it would be fair to say that the Roman Empire had no true concept of nationality; and, equally, that that species of internationalism which consists in the absence of nationalism persisted to some extent in the days of the latterday Empire. Likewise, it is broadly true that England had no law of aliens before the loss of Normandy.⁴ In the one case the alien *ex hypothesi* did not exist; in the other he was virtually never encountered.

It is a truism that the development of a concept of nationality presupposes both a plurality of States and a system of international relations. It is nevertheless remarkable that the emergence of that concept in municipal law occurred at a comparatively late date in the history of the modern system of States. For it appears that it was first to be found in post-revolutionary France.⁵ This must not, however, be taken to imply that

¹ See Kelsen, *General Theory of Law and State* (translated by Wedberg, 1945), p. 241.

² Israel had until recently no nationality law. The nationality law of India is still embryonic: see further below, p. 289.

³ An instance of the extension of social benefits to others than British subjects is provided by Statutory Instruments, 1952, No. 1949, whereby the family allowances scheme is extended to British protected persons. The latter are not, however, aliens for any but internal purposes, nor, in virtue of the British Nationality Act, 1948, ss. 3 (3) and 32 (1), are they any longer aliens even internally for the purposes of either that Act or the Aliens Restriction Acts.

⁴ Pollock and Maitland, *History of English Law*, vol. i, pp. 461-5. Cockburn averred that before the Conquest the *jus soli* applied, a principle well-suited to 'the isolated position of this Island, and the absence of intercourse with other nations' (*Nationality* (1869), p. 7). There is no evidence of this—and no explanation why the same principle should have applied in France, the least isolated country of the medieval world (cf. Randall in *Law Quarterly Review*, 40 (1924), p. 18).

⁵ See Makarov, *Allgemeine Lehren des Staatsangehörigkeitsrechts* (1947), pp. 17 ff., 107 ff.

before that epoch States were not concerned to distinguish nationals from aliens. They were indeed; but such distinctions as were employed were made *ad hoc* and involved no complete conception of nationality considered as a status. It was only the introduction of compulsory military service upon a totalitarian scale and the universalization of national political rights which evoked nationality laws as such. And even when the several national Legislatures thus intervened to provide in effect codes of nationality law, nationality was still for some time considered to be no more than the prerequisite of political, and later civil, rights and duties and not as, so to speak, a thing in itself. But this final step was not long delayed, and would appear to have been taken with the enactment of the Prussian Law of 1842. It was incidentally attended by the adoption of the terms 'national' and 'nationality' in preference to such older expressions as 'subject' and 'allegiance'.¹

In the common law countries, of course, civil status has at no time been made dependent upon nationality.² The distinction between nationality conceived of as a single status and nationality as a term of the legal régime differentiating between national and alien is therefore unfamiliar. The term used in the former connotation is, in a certain sense, thus 'foreign to our institutions'. The common law has in general no occasion to classify aliens into their several alien nationalities, and no occasion to differentiate between such domestic nationals as do not and such as do possess a foreign nationality simultaneously with domestic nationality. It is this circumstance, it is believed, which has led to confusion of thought on the part both of the Legislature and of the courts.

For if the system of conflict of laws of a particular State does not employ the concept of nationality for the purpose of determining and regulating civil status, the law of that State will encounter that concept only infrequently. A nationality may well be an individual's highly prized possession. That this view is widely held is indicated by the inclusion of the right to nationality amongst the 'rights' enumerated in the Universal Declaration of Human Rights adopted by the United Nations in 1948.³ In most States nationals alone have a right of entry into the territory of the State; although occasionally nationals may not possess this right,⁴ aliens invariably do not.

¹ See Makarov, *op. cit.*, pp. 19 ff.

² The English rule, not followed in the United States, that a man reverts to his domicile of origin on leaving permanently the place of his domicile of choice, indicates, however, that the concept of nationality had considerable influence on that of domicile, as do also such subordinate rules as that the domicile of a married woman is always that of her husband (likewise not followed in the United States), or the former rules concerning Anglo-Indian and Anglo-Egyptian domicile and the like.

³ Article 15 (1).

⁴ As, for example, in Canada, South Africa, Australia, and New Zealand under the former law where, notwithstanding the common status of British subjects, the immigration of, in particular, orientals was severely restricted, if not altogether excluded. The factual position has not changed, but whether its continuance any longer involves discrimination between nationals depends on

Once, however, he has succeeded in crossing the frontier, which tends to be guarded by the repositories of administrative discretion rather than by the custodians of the law, it is suprising how little it matters to the alien that he is not a national of the State within whose territory he is. The courts are invariably open to him; the social services are usually available to him; more often than not he may buy and sell freely, and hold land. Whilst he remains—and of course he may always be expelled, though, it would seem, for grave cause alone, if he has been allowed to settle¹—he is denied only political rights, which may not interest him overmuch, and perhaps also the holding of certain offices or the practice of particular professions, which limitations he will usually know of in advance and by which he will therefore commonly not be discommoded. In short, what the alien must stand in fear of is the arbitrary use of administrative discretion rather than the rigours of the law. Thus in the United Kingdom, though perhaps the case is an extreme one, the resident alien is in law barely distinguishable from the national. He has certain special obligations of a police character, such as the obligation to register his place of abode. Taking no account of the contemporary national registration system, which may not endure for ever, it may be remarked in passing that the national shares this obligation in part since he must declare his nationality in an hotel or the like: a duty which stems from the Aliens Restriction Acts and whose imposition might well be thought *ultra vires*.² Then, in civil law, the alien may neither vote nor be a candidate in political elections; nor hold any public office—save in so far as the restrictions on his employment in either the armed forces or the civil service may have been, as they are at present, relaxed; nor, as a general rule, own, command, or pilot a British ship.³ The situation is not materially different in the United States of America.

The foregoing sketch of the situation in the United Kingdom ignores one important circumstance significant both for the understanding of the nature of municipal nationality law in general and of the difficulty of determining who is a British national in particular. This is, that there is not and never has been any domestic concept of British nationality as such.

what view is taken of the effect of the 'common clause', as to which see above, pp. 246–7, and below, pp. 277, 279–80.

¹ See Oppenheim, *International Law*, vol. i (7th ed. by Lauterpacht, 1948), § 323.

² This duty arises from Article 7 of the Aliens Order, 1920 (S.R. & O., No. 448), made under the Aliens Restriction Act, 1914, 4 and 5 Geo. V, c. 12, s. 1, as amended by the Aliens Restriction (Amendment) Act, 1919, 9 and 10 Geo. V, c. 92, s. 7, and kept alive by the successive Expiring Laws Continuance Acts. The original section authorized Orders providing for the registration, &c., of aliens and for any other matter [*scil. ejusdem generis*] expedient for the safety of the realm, but only in time of war or emergency. The Act of 1919 removed the limitation that a war or emergency must exist. The validity of the continued imposition of the duty generally would seem to depend on whether, in time of peace and absence of emergency, the safety of the realm and/or the control of aliens requires the parallel control of subjects in this context.

³ See in general the present writer's *British Nationality* (1951), ch. 4.

In the present century it has been assumed that the common law has never recognized any classification of individuals from the point of view of national status save the mutually exclusive categories of subjects and aliens, and that the category of subjects is co-extensive with that of British nationals. Thus the successive statutes regulating the acquisition and loss of the quality of being a subject have been styled the British Nationality Acts. The pretended rule on which this usage is based does seem to find some support in the rule laid down at least for the *postnati* in *Calvin's* case.¹ But that case left undetermined the situation of the Scots *antenati*. Were they aliens in England? It is somehow difficult to believe that the negative assumption that they were was carried to its logical extreme. It is even more difficult to believe that the Dutch and Hanoverian *postnati* were treated as subjects during the later unions of the Crown. This was assumed after the event in *Isaacson v. Durant*.² It was not, however, necessary to the decision in that case that the Hanoverians were not subjects after the dissolution of the Union, that they had been such during its continuance. There is in fact considerable evidence that Scots, Dutch, and Hanoverian *postnati* were regularly naturalized in England and therefore cannot have been considered subjects during the relevant Unions. In the light of this the view is tenable that *Calvin's* case was rejected already in the late seventeenth century and that there is something in Piggott's theory that the Hanoverian *postnati* were merely non-aliens. That theory has been disapproved on the ground that the common law knows no status intermediate between that of subject and that of alien. The criticism implies, however, that alienage and equally the quality of a subject, were statuses. But they were not. In certain contexts, such as that of the right to own a ship, it could be material to know who was a subject and who not. Yet the more important distinction in this context, and also in that of the capacity of a person to hold public office or a grant of Crown lands in accordance with the Act of Settlement, was that between natural-born subjects and other persons rather than between subjects (either natural-born or naturalized) and aliens. Similarly, in connexion with the right to hold land, the distinction between subject and alien was less significant than that between the subject and the endenized alien on the one hand, and the alien not endenized on the other. The cleavage between subject and alien did not become the principal distinction until the statutory equalization of the rights of natural-born and naturalized subjects.³

When the distinction between natural-born and naturalized subjects disappeared to all intents and purposes, and when permanent restrictions came to be imposed on aliens, the quality of being a subject assumed the aspects

¹ (1608), 7 Co. Rep. 1.

² (1886), 77 Q.B.D. 54.

³ See the present writer's *British Nationality Law and the History of Naturalisation* (1954).

of a status. This development was attended by the largely unconscious assumption before referred to, that the only kind of British national was the British subject. The absence of any complications arising from a union of Crowns facilitated this assumption. The situation of locally naturalized persons could be reconciled with it on the thesis that theirs was a limping status: they were subjects in the territory in which they were naturalized and whilst abroad, but not elsewhere in British territory.¹ In fact, the lack of extraterritorial effect of colonial naturalization was scarcely noticed until after such limited naturalization had been largely, though not entirely, excluded by the introduction of the Imperial certificate. The reconciliation with the conception of the categories of subjects and aliens as mutually exclusive of the position of inhabitants of colonial protectorates was never attempted. Presumably because these persons seldom travelled they were ignored—or rather assimilated to the category of aliens in accordance with the theory that the powers of government exercised in the places to which they belonged were instances of ‘foreign’ jurisdiction. But such persons were British nationals in an international sense, and to certain categories of them the designation of British protected persons was later given. For domestic purposes they remained aliens.² No domestic category of British nationals which would have embraced them as well as British subjects was ever developed.

Though the régime of aliens in the United Kingdom and the United States is a particularly benign one, it is clear from a cursory survey of its details that the concept of nationality can play only a small part in a municipal system of law. The case is somewhat different where the conflict rules of that system employ the concept. For then there must be adopted not merely a rough distinction between nationals and aliens, but an exact conception of an alien’s nationality. It is thus not sufficient for a French court confronted with an alien’s will to know merely that the testator was not a French national. It may be said that, where such is the case, the municipal system of law in question is not employing the concept of nationality of necessity, or in its true context, but merely as one of a number of possibly equally convenient devices for making that determination of the origin or context of persons or transactions which the operation of the general theory of the conflict of laws demands. The tests of domicile or permanent residence would avail equally well for the purpose. But it is noteworthy that the same criticism has been levelled at any and all uses of the notion of nationality in municipal law. It has thus been said that ‘Nationality . . . though primarily a conception with an international function, is often borrowed as a convenient attachment for certain strictly domestic purposes, as in statutory provisions making nationality a requirement of admission to certain

¹ See below, p. 271, n. 4.

² See below, p. 279.

public offices or quasi-public or even private professions'.¹ And it is difficult to resist the conclusion that the criticism, if valid, would apply also to the formerly rare cases in which common law systems have attributed precise foreign nationalities to persons, whether nationals or aliens, for the purposes of applying, for example, legislation respecting enemy property;² or have recognized that nationals may be simultaneously nationals of some particular foreign State, for example, for purposes of determining when domestic nationality is lost by foreign naturalization or may be renounced in virtue of plural nationality.³

What, it may be asked in short, is the meaning of nationality in municipal law? Is it no more than a 'convenient attachment', a rough and ready 'connecting-factor', akin to residence and domicile? Is it indeed 'primarily a conception with an international function', a notion rather of international than of municipal law? It cannot be denied that this is a view which is neither unusual nor unnatural. Yet it is no less clear that the concept of nationality developed originally within the State rather than outside the State and that the principal, if not the only, rule of international law respecting nationality is frequently, though perhaps erroneously, understood to be that the determination as to who are and who are not its nationals is a question exclusively within the domestic jurisdiction of a State.

III. *Nationality and international law*

(a) *In general*

Having regard to the rule, however formulated, that all nationality questions are within the *domaine réservé* of a State, it might appear that nationality, notwithstanding that it is utilized by municipal law as a borrowed term of reference, is not, in turn, an institution of international law. Each system seems, as it were, to assume without question that the other has rules in the matter, but neither has, or has necessarily, any such rules. Attempts have been made, however, to break out of the vicious circle and to show that international law has rules concerning nationality other than that the determination of nationality has nothing to do with international law. Thus various authorities, whilst accepting the generality of the discretion of States in the matter, maintain that there are some limits on that discretion. There was indeed a proposal before the Institut de droit international for a resolution to the effect that even the general principle of the exclusive jurisdiction of States in matters of nationality did not exist, and that such

¹ Koessler in *Yale Law Journal*, 56 (1946), pp. 58 and 70, n. 76. Another example of the municipal use of a term only partly of a municipal law character is provided by the tying of such matters as the termination of leases or the expiry of legislation to the duration of 'war', as a result of which the test of termination of war in, for instance, both English and American law, has become in this century almost wholly unrelated to the rules of international law.

² See above, p. 244.

³ See below, pp. 271-5.

matters were 'soumises à la compétence croissante de droit international'; but it was rejected.¹ Less extreme, but scarcely more precise, are such suggestions as that of the Harvard Draft Convention that 'under international law the power of a State to confer its nationality is not unlimited', and that 'If State *A* should attempt to nationalize² all persons living outside its territory but living within 500 miles of its frontiers, it would clearly have passed [the] limits . . .'.³ National Legislatures and Governments, and courts, both national and international, have contended for the existence of such more particular principles as that a State may legislate respecting the nationality of any person resident within its territory;⁴ that a State may not impose its nationality upon individuals not permanently resident within its territory without their consent;⁵ that a State may not prevent its nationals from voluntarily acquiring a new nationality and abandoning that which they had before;⁶ or that a State may not arbitrarily deprive its nationals of their nationality.⁷ Writers have suggested such further subsidiary principles of international law as that the nationality of a married woman is presumptively that of her husband; that the nationality of legitimate children follows that of the father, of illegitimate children that of the mother; or that a national of one country naturalized in another has no right to resume his original nationality.⁸

No doubt all or most of these suggestions, if followed, would conduce to convenience and humanity. But it is difficult to admit the claims of any of them to be rules of international law. This applies as much to the more general as to the particular suggestions. To the former may be added the contention that the discretion of States in matters of nationality is subject to the doctrine of abuse of rights. This is an interesting suggestion which deserves special mention. It may be doubted, however, whether it is of any assistance. For in order that a right may be considered to be abused its existence must first be postulated. And the examples of alleged abuse of rights, e.g. the imposition of domestic nationality upon resident aliens, which advocates of the theory adduce, are cited by other writers as examples

¹ *Annuaire de l'institut de droit international*, 1928, pp. 11 ff.

² I.e. impose nationality on.

³ *Research in International Law, Draft Convention on Nationality* (1929), Article 2, and Comment, p. 13.

⁴ Cf. the discussion on the text of the French Civil Code in Fenet, *Recueil complet des travaux préparatoires du Code Civil*, vol. 7 (1836), p. 324, in the course of which it was suggested that '... le droit des gens . . . permet à un gouvernement d'adopter et de compter au nombre des gouvernés tout individu qui se trouve porté sur son territoire'.

⁵ This view has been frequently maintained by the Government of the United States, as in the United States-Mexican claims reported in Moore, *International Arbitrations*, vol. iii (1898), pp. 2468-82.

⁶ Cf. U.S. Code, Title 8, s. 800.: 'Whereas the right of expatriation is a natural and inherent right of all people. . . .'

⁷ Cf. Lapradelle in *Revue Darras* (1929), pp. 308, 311; Wolff, *Private International Law*, 2nd ed. (1950), § 126.

⁸ E.g. Gareis, *Institutionen des Völkerrechts* (1901), pp. 78 ff.

of international delinquencies, that is to say, of cases where there is not an abuse of a right but no right at all.¹

Some of the uncertainty as to what the relevant rules of international law in fact are or ideally should be is dispelled if consideration is given to the question as to what, having regard to the nature of that system, its rules on the subject could be. Could international law properly or conveniently provide, for instance, that every individual must have a nationality; or that every individual must acquire the nationality of the State in whose territory he is born; or that women on marriage shall acquire, or not acquire, the nationality of their husbands? No doubt upon a monistic interpretation of that system, it would be possible to elevate such rules into principles of international law. But the general approach to the whole question has traditionally been a dualistic or negative one. The power to regulate its own nationality has been considered as an aspect of the sovereignty of a State. The details of nationality law have been consigned to municipal law. This view is reflected in the celebrated declaration of the Permanent Court of International Justice in the *Tunis and Morocco Nationality Decrees* case that 'In the present state of international law, questions of nationality are . . . in principle . . . solely within the jurisdiction of a State'.² This phraseology did not, as has been frequently pointed out, imply that this was contemporaneously true in every case, nor that it would necessarily remain generally true. Subject to these limitations, the proposition advanced by the Court is undoubtedly correct. But, it is submitted, it does not represent so much a rule of international law as a deduction from a rule. The relevant compulsive rule is not so much that a State is free to regulate its own nationality as that it may not regulate that of any other State. State *A* may not declare that all individuals are its nationals because some of the persons affected will already be nationals of State *B*. It may be objected that what is here involved is a distinction without a difference. The sovereignty—in the sense of independence—of one State is not a deduction from the independence of others, nor are the nationals of one State merely those persons who are not the nationals of other States. There must, in short, be a starting-point somewhere: territory of State *B* is not territory of State *A* because State *B* has an affirmative title to it; and the rule that State *A* cannot impose its nationality upon the generality of the nationals of State *B* implies that State *B* shall have indicated positively who its nationals are. This is, of course, true. International law assumes a plurality of States, and the concepts of sovereignty and jurisdiction imply a multiplicity of sovereignties

¹ Cf. Makarov, *op. cit.*, pp. 70-72.

² *Publications of the Permanent Court of International Justice*, Series B, No. 4, p. 24. This pronouncement was in fact *obiter*. For the Court found that the subject-matter of the Decrees in question in the case before it was not, as the result of a treaty, within the exclusive competence of France.

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and jurisdictions and the exclusiveness in principle of any one of any
other.

However, just because the idea of territorial sovereignty has no meaning except upon the hypothesis that there exists a sphere outside its limits, it is essential to proceed towards its definition from without, as it were, rather than from within. Similarly, nationality has no content capable of exclusively internal definition. For this reason Article 1 of the Hague Convention of 1930 on Certain Questions relating to the Conflict of Nationality Laws rightly provided, following the pronouncement of the Permanent Court above cited, not only that

'It is for each State to determine under its own law who are its nationals',

but also that

'This law shall be recognized by other States insofar as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.'¹

However, it is not enough to say that the nationality of a State is not, by international law, a matter exclusively of municipal law but an aspect of the sovereignty of States and therefore subject to that process of reconciliation with the sovereignty of other States which international law exists to effect. It is only to state the problem, not to solve it. It is thus insufficient to say that nationality is 'the legal tie which binds individuals to the State and entitles them to its protection in international relations, and also renders them subject to the personal jurisdiction of the State'.² This fairly comprehensive description is indeed more satisfactory than that of Vattel, who said merely that 'La nationalité est le lien qui rattache à l'État chacun de ses membres'. For, whilst it implies, as does also Vattel's definition, that unless the State concerned affirmatively claims a particular individual as its national, nothing can make him such, it emphasizes that nationality has an external as well as an internal relevance. Given that the right of protection belongs to the State rather than to the individual, it would be more accurate if it were amended so as to read 'the legal tie . . . which entitles the State to protect . . . individuals'. But even thus amended the description is circular.

(b) The tests of protection and jurisdiction

There does exist a certain correlation between nationality and the right of protection. But it is impossible to identify a State's nationals with those whom it is entitled to protect or vice versa. For States are exceptionally entitled to protect persons other than their nationals. In relation to particular classes of nationals, it may only be possible to say that they are nationals

¹ *Treaty Series*, No. 33 (1937).

² *Jones*, op. cit., p. 2.

because they are protected, so that the title in virtue of which they may be protected is obscure. Further, a State is ordinarily disentitled from protecting such of its nationals as are also nationals of another State as against that other. To these difficulties there may be added another which, however, is perhaps only of historical interest, namely, that a certain hesitation was formerly shown as to whether the basis of the right of protection was not domicile rather than nationality.

The cases in which a State may protect those who are not its own nationals can, however, be dismissed as irrelevant. For they arise only exceptionally, as where by treaty the conduct of the foreign affairs of one State is confided to another State,¹ or where in time of war the interests of one belligerent in the territory of the other are confided to a neutral State.² The provision in the Geneva Convention for the designation of Protecting Powers can be regarded as creating a special case of protection of non-nationals of this category.³ And it may be noted that formerly, under treaty, some States assumed the protection of nationals of other States of a backward character even against the local sovereign where such nationals were employed by the protecting States,⁴ though it is probable that no treaty of this sort now survives.

The occasional protection by States of non-nationals is less hampering to the employment of protection as the test of nationality than is the existence of categories of persons who are acknowledged by a State to be nationals solely because they have been habitually protected. A subsidiary class of British nationals, namely, British protected persons, was formerly of this sort. For the British Protected Persons Order, 1934, recited with respect to the British 'colonial protectorates' in Africa that there were 'certain persons who are regarded as belonging to those territories and [who] are afforded His Majesty's protection, and are known as British protected persons',⁵ and set out to define such persons. Thus the ground on which the individuals concerned were conceived to be 'British protected persons' in the sense of British nationals of a category other than that of British subjects, consisted in their habitual protection. They were expressed to be British nationals because they were protected, and solely for that reason. It might appear, therefore, that it could not be argued that the right of

¹ For example, as in the case of Danzig under the Treaty of 9 November 1920 with Poland: see Oppenheim, *International Law*, vol. i (7th ed., 1948), p. 175, n. 4.

² Cf. Oppenheim, *op. cit.*, vol. ii (7th ed., 1952), § 98. Borchard calls this 'delegated protection' (*Diplomatic Protection of Citizens Abroad* (1915), pp. 471-5).

³ Cf. Oppenheim, *op. cit.*, vol. ii (7th ed., 1952), § 126*aaa*.

⁴ See as to the protection of interpreters and other employees of the foreign legations in Morocco the Convention of Madrid of 3 July 1880, Articles 2 and 6. There are several decisions of international tribunals as to the status of protégés, e.g. *Falla-Nateuf v. Germany*, *Djevahirdian v. Germany* (*Recueil des décisions des Tribunaux Arbitraux Mixtes*, vol. 7, pp. 653, 602); *Spanish Morocco Claims case* (*Annual Digest*, 1923-4, Case No. 128); *Najera case* (*ibid.*, 1927-8, Case No. 206).

⁵ S.R. & O., 1934, No. 499.

the United Kingdom to protect them arose from their British nationality. Nor were these persons the only category of British nationals who derived nationality from the fact of protection rather than the reverse. For before the expression 'British protected person' acquired the technical meaning given it by the British Nationality Act, 1948,¹ it included not only persons within the Order of 1934 and the far more numerous inhabitants of native States under the protection of the Crown, but also a presumably small number of persons who had been granted British passports, and thus symbols of the protection of the Crown, in error, but had been allowed for reasons of humanity to retain them.² In this connexion it has to be recalled that the House of Lords held in *Joyce v. Director of Public Prosecutions*³ that the appellant had been properly convicted of treason notwithstanding that he was not a British subject because, having obtained a British passport by fraud, he had obtained the protection of the Crown and owed a corresponding allegiance. But it may be recorded incidentally that recipients of local naturalization in colonies and the like were, about the middle of the last century, invariably warned that the Crown made no claim to protect them outside British territory.⁴

It might follow from situations of the sort described in the preceding paragraph that the application of the test of entitlement—in the broadest sense—to protection as the test of nationality was self-stultifying. The circumstance that a State is not necessarily entitled to protect all who satisfy an independent, municipal legal, criterion of nationality might also be taken to show that the correlation of protection and nationality is necessarily uninformative. For, as has been said, in general State *A* cannot protect as against State *B* a person who is a national of both, though either may protect him against a third State. This seems to be a rule of some antiquity. The Nationality Commissioners reported in 1869 that:

'So far as we are aware, no attempt has ever been made on the part of the British Government (unless in Eastern countries where special jurisdiction is conceded by Treaty), to enforce claims upon, or to assert rights in respect of, persons born abroad as against the country of their birth whilst they were resident there, and when by its law they were invested with its nationality.'⁵

This statement possibly reflects some of the uncertainty which in the earlier part of the nineteenth century attended both the basis of the right of protection and one special aspect of that right—the principle of the nationality of claims. For it appears to rest abdication of the right of protection and, equally, of personal jurisdiction, as much on the foreign domicile as on the foreign nationality of British nationals born abroad. This is consistent with

¹ See below, pp. 276, 291.

³ [1946] A.C. 347.

² Cf. Jones, *op. cit.*, pp. 291–9.

⁴ See below, p. 272, n. 4.

⁵ *Report of the Royal Commissioners for Inquiry into the Laws of Naturalization and Allegiance*, 1869, VIII.

the tendency displayed at that time to determine the nationality of claims according to domicil.¹ But, since that time, the rule has assumed the form in which it was restated in the Hague Convention of 1930, Article 4 of which provides: 'A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.'

If the sphere of the right of protection thus does not afford any test of nationality, it may be asked whether or not the same is true of the sphere of personal jurisdiction of States. In other words if, as is said, the nationals of a State are such persons as are subject to its personal jurisdiction, is it possible to determine independently which persons are in fact subject to that jurisdiction? Now the term 'personal jurisdiction' is familiar enough. It connotes a jurisdiction which a State has outside its territories over individuals, irrespective of the local situation of such individuals. It is thus to be distinguished from territorial jurisdiction, and from quasi-territorial jurisdiction, i.e. the jurisdiction which a State may claim over persons aboard ships wearing its flag. It must also be distinguished from jurisdiction *communis juris*, such as the jurisdiction over pirates of whatsoever nationality, which any State may claim. Indeed, though to say so is to argue in a circle, it is such jurisdiction as a State may have over its nationals abroad. No doubt, as a matter of municipal legal theory and of domestic practice, States conceive that they have such jurisdiction and attempt to exercise it at least in part. But it is quite remarkable to what a small extent any so-called personal jurisdiction is claimed when it comes down to details. The common law States appear to exercise jurisdiction over the acts and omissions of their nationals abroad only in regard to crimes of peculiar gravity or far-reaching effect, such as murder or bigamy.² They do indeed differentiate to some extent from the point of view of civil jurisdiction between such persons in the territory of other States as are their nationals and such as are not. But this has to be appreciated in the light of the fact that the bases on which, and the extent to which, they assert civil jurisdiction in any kind of case are extremely limited. Other States assert a far wider civil jurisdiction, e.g. in any case where a national is plaintiff or where the defendant has property within the jurisdiction.³ And there has apparently never been an international decision restricting the assumption of civil jurisdiction over, or the application of strictly domestic law to, the nationals of one State resident outside the territory of another State by the courts of that other.⁴ Finally, turning once more to criminal jurisdiction, it has to be

¹ See Sinclair in this *Year Book*, 27 (1950), pp. 125, 131-8; and Borchard, *op cit.*, §§ 243-52.

² See below, p. 278.

³ Cf. French Civil Code, Article 14.

⁴ Cook, *Logical and Legal Bases of the Conflict of Laws* (1942), pp. 40, 78.

noted that there is high international judicial authority for the proposition that 'The territorial character of criminal law is not an absolute principle of International Law'.¹

It is generally admitted that the so-called personal jurisdiction of States over their nationals, or over others, is not exclusive, but concurrent with the territorial jurisdiction of other States in whose territory such nationals may happen to be or of which they are also nationals. It is likewise universally agreed that measures of execution in pursuance of personal jurisdiction cannot be taken within the territory of a foreign State. So long, therefore, as an individual remains within a foreign State, his alleged subjection to the personal jurisdiction of the State of which he is a national cannot remove him from the local territorial jurisdiction. And if he neither returns home nor has property there, the consequences of his disobedience to the decrees of his parent State cannot be visited upon him. These facts provoke conclusions of some interest as to the nature of personal jurisdiction. Clearly it cannot be exercised to the full unless the individual concerned comes within the territorial jurisdiction of the State concerned. But this does not imply that its true basis is territorial. It is, indeed, a possible view that each State can, if it wishes, legislate for all the world, and that the so-styled 'impermeability' of other States demands only that it shall not attempt to enforce its decrees within the territory of the latter. Such a view ignores, however, that a State may not ordinarily visit penalties upon the nationals of others coming within its territory with respect to acts or omissions occurring elsewhere. When a reason is sought for this rule—if, as appears, it be a rule—the explanation seems to be that for a State to act in this way would be to commit an international delinquency against the parent State or States of the aliens concerned. In other words, that which restrains State *A* from legislating for the nationals of State *B* with respect to their conduct anywhere else than within the territory of State *A* is the right to protect its nationals enjoyed by State *B*. State *A*'s own nationals, however, are amenable to extraterritorial legislation because no other State can protect them against it. But why this is the case is not easy to see. Cannot such persons—nationals of *A*—be protected because there is no capable protector, because they are not the nationals of, for instance, *B*? Or cannot they be protected for the more positive reason that they are nationals of the State against which they would, if they could, seek protection? The case of the plural national, considered in the light of the rule that one State of which he is a national cannot protect him against another such, would point to the correctness of the second solution. That of the stateless person, whom any State may assimilate to the condition of

¹ *Case of the S.S. Lotus* (1927), *Publications of the Permanent Court of International Justice*, Series A, No. 10, p. 20.

its own nationals for the purposes of personal jurisdiction, would point to precisely the opposite explanation.

If the circumstance that one State cannot enforce measures against its nationals within the territory of another without the consent of that other be dismissed as a mere matter of procedure, the fact still remains that there exists no independent test for the identification of the individual amenable to the exercise, even without execution, of the personal jurisdiction of States. Such a decision as that in *Joyce v. Director of Public Prosecutions*¹ would indeed indicate that the sphere of such jurisdiction is not confined to nationals. That particular decision can indeed be rationalized on the basis that the appellant, because of his fraud, was constructively a British national. But it is curious that it has been argued that in precisely the circumstances of that case conduct such as that of Joyce would operate to negative rather than establish nationality. For Dicey was of opinion that the child of an alien who fled abroad to join an enemy, leaving his wife to bear the child in British territory at a time when he was already bearing arms against the Crown, would not be a British subject.² And, going much farther afield, it may be contended that the very existence of the discipline of the conflict of laws, with its variety of 'connecting factors', belies the adequacy of the rule that a State may legislate extraterritorially only for its nationals. Whatever the theoretical basis of the application of foreign law in accordance with conflicts rules, any State which 'prefers to consider itself civilised'³ applies foreign law. But whether it does so in relation to the nationals, or alternatively in relation only to the domiciliaries, or even the mere permanent residents, of the foreign State concerned, is a matter of individual legal tradition.

(c) *The analogy of territory and the influence of the territorial quality of municipal law*

A way out of the impasse created by the circumstance that international law apparently leaves the definition of nationality to municipal law despite the international function of that concept, and provides no criteria of its own such as the extent of the right of protection or the sphere of the personal jurisdiction of States whereby an international definition can be arrived at, may perhaps be found by examining the rules as to the territorial sovereignty of States and drawing analogies from them. A State, it may be said, is an amalgam made up of an independent Government, a definite or definable territory, and a population. Cannot, therefore, some useful conclusions be drawn as to who are the nationals of a State by analogy from the

¹ [1946] A.C. 347.

² *Conflict of Laws*, 5th ed. (1932), pp. 146-8.

³ *Direction der Disconto-Gesellschaft v. United States Steel Corporation*, 267 U.S. 22, at p. 24, per Holmes J.

rules as to what is its territory? It may be objected that, though a State must have a population, it need not have nationals. But that is a largely theoretical objection and may in any case be countered since a State may assert something less than territorial sovereignty with respect to at least parts of the territory it controls, e.g. colonial protectorates.¹ May it not therefore be said that the relationship of a State to its nationals is not unlike that which it has to its territory? Just as territory is both an essential element of the State, and thus an element of a subject of international law,² so also it is, as it were, the property of the State and thus an object of international law. The body of a State's nationals occupies a similar dual position. The legal nature of a State's nationality law is thus to be ascertained by analogy with the rules governing the attribution of territory to States.

Certainly this analogy is very attractive. For looking at the physical mass of territory in the world, it may be assumed to fall under the sovereignty of a single State exclusively, under the sovereignty of more than one State, under the sovereignty of none, or under the exclusive control, not amounting to sovereignty, of a single State. In other words, there are places—such as the island of Great Britain—under the sovereignty of one State only, others—such as the Anglo-Egyptian Sudan—subject to a *condominium*,³ yet

¹ This argument is not necessarily valid. A State may maintain that its colonial protectorates are not its sovereign territory for internal purposes. But it is uncertain how far protestations of this sort have international significance. A colonial protectorate may be an area reserved for future occupation in which other States agree by treaty not to compete or interfere. With respect to such an area the international responsibility of the State concerned is absolute, save in so far as the vastness of the territory or lack of penetration may reduce the 'standard of care' to be observed. The right to protect the inhabitants as against other States is certainly absolute, though they may not be considered nationals for domestic purposes. If, however, the protecting State undertakes by treaty not to incorporate the area concerned within its sovereign territory, as between the treaty-making powers that area may be conceived of as having a quasi-international status akin to the status of mandated or trust territories. However, since the inhabitants of colonial protectorates are invariably nationals of the protecting State in the international sphere, the fastening upon these areas of something in the nature of an international status has no significance in regard to nationality. Or, to put the matter another way, the establishment of any sort of colonial protectorate is inevitably and essentially 'un mode . . . d'exercice de la souveraineté' (Gairal, *Le Protectorat International* (1910), p. 154).

² This proposition is an aspect of the 'space' theory of territorial sovereignty, as to the influence of which see Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), § 38. The practice of States leans less to this theory than to the 'object' theory (*ibid.*, §§ 40 and 170). At the same time only a minority of writers maintain that there may be a State without territory (see Oppenheim, *op. cit.*, vol. i (7th ed., 1948), p. 114, n. 3, and § 170). Thus an element of the 'space' theory is inevitably accepted, the position being, as it has been expressed, that 'The importance of State territory lies in the fact that it is the space within which the State exercises its supreme authority. State territory is an object of the Law of Nations, because the latter recognizes the supreme authority of every State within its territory.' (*Ibid.*, p. 408.)

³ A question arises here as to whether territorial sovereignty over a territory under *condominium* is in fact, as has been said, 'under the *joint tenancy* of two or more States' (Oppenheim, *op. cit.*, vol. i (7th ed., 1948), p. 409), or whether the truer analogy would not be the common law tenancy in common. Certainly it is true that the one State cannot alienate the territory without the consent of the other or others (cf. *Salvador v. Nicaragua* (1914), and *Costa Rica v. Nicaragua* (1917), decisions of the Central American Court of Justice discussed in Lauterpacht, *Analogies*, pp. 288–9). But it may be questioned whether the conclusion reached in these cases that Nicaragua could not alienate waters 'owned' jointly with other States can properly be based on any particular

others—such as the mandated territory of South-West Africa—with respect to which the concept of sovereignty does not apply, and still others—such as the colonial protectorate of Swaziland—which are under the exclusive control of a single State, but are not claimed by it as sovereign territory. Similarly there are persons who are nationals of a single State, persons who are nationals of more than one State, persons who are stateless or who at least possess the nationality of no State, and persons who are externally but not necessarily internally nationals of one State. Perhaps the analogy should not be pushed too far: the analogue of territory which belongs to a protected State is not easy to find—though the expression *protégé* is a well-known one.¹

It may be asked whether it would not be better to rely on the analogy of jurisdiction, rather than that of the territory, of States. Is not the quality of being a national of a State very much more like the quality of being under its jurisdiction than that of being, as it were, its territory? In fact, is not the quality of being a national of a State actually that of being under its jurisdiction? The answer to the latter question must be in the affirmative. It may, however, be qualified by the observation that the jurisdiction which the link of nationality gives to a State is not the whole of its jurisdiction. The rules, such as they are, defining the extent of personal jurisdiction are, as has been seen, inadequate guides as to who is or may be made a national of a particular State. And the reason for this, as has also been seen, is that territorial sovereignty has always been the principal basis of jurisdiction. Both jurisdiction and allegiance have largely been conceived of as geographical tracts, and theories of the State as a jurisdictional complex divorced from territory have had little influence in international law.

It is indeed true in a more general sense that the problem as to the permitted range and character of a State's nationality law is a jurisdictional one. It is of the same order as the problem of the applicability of the *lex situs* in any conflicts question. A State applying conflicts rules providing for the application of a foreign law in a given case may have to face in many

theory of community of property, e.g. joint tenancy as opposed to tenancy in common. Though there are difficulties in describing as a 'status' a condition of affairs which is not universally recognized (cf. Schwarzenberger in *Current Legal Problems*, 4 (1951), pp. 30-31), it is attractive to apply to the facts in issue in these cases the suggestion advanced by the International Court of Justice in the *South-West Africa* case and to say that sovereignty, divided or individual, is not a relevant conception and that the question is rather one of a particular status *in rem* (cf. *I.C.J. Reports*, 1950, p. 128). As regards a *condominium* in particular, may it not be said that whether the applicable régime is one of quasi-joint tenancy or quasi-tenancy in common depends on the facts of the case? The Anglo-Egyptian Sudan, with a single administration, presents aspects of a joint tenancy; the Anglo-French New Hebrides, where each State exercises separate jurisdiction over its own subjects, looks more like a tenancy in common (cf. Oppenheim, *op. cit.*, vol. i (7th ed., 1948), loc. cit.). And even where the territorial régime has aspects of a joint tenancy, when attention is turned to the status abroad of inhabitants of a *condominium* the analogy is seen to break down: such persons are seen to partake of the nationality of one or both of the States concerned and not to possess an intermediate status.

¹ See above, p. 257, n. 4.

contexts the question what to do when the relevant foreign law is out of tune with international law. Should a Swiss court recognize a German divorce granted on the basis of the Nuremberg laws?¹ Should a British court recognize a title to personal property acquired under foreign legislation which has confiscated the property from British nationals? In the second case² it would seem that the court has a discretion not to apply the *lex situs*. But when it is asked what an Italian court should do, faced with the competing claims of the original British owners and the new Italian owners, the solution of the difficulty is seen to involve a fundamental question as to the theory upon which conflicts systems depend. The question is whether the rule is that the *lex situs* must be applied where it is unobjectionable, or that it may not be applied when it is objectionable. It would be attractive to say that an Italian court, no less than a British court, must not recognize a competing title derived from subsequent Persian legislation constituting a denial of justice to the Company. An argument of this sort may indeed be developed. It can, however, proceed on either of two independent lines: that Italian law, including its conflicts rules, permits the ignoring of the *lex situs* in such a case of its own motion; or that the Italian court is required by international law to adopt this course. Even assuming the second of these alternatives to be accepted, it has to be acknowledged that it contains alternatives within itself. Thus the situation either may be that the Italian court is disabled altogether from recognizing the title acquired in violation of international law; or it may be that, if the court does recognize that title, the responsibility of Italy is involved; or it may merely be that the judicial confirmation of that title may be ignored outside Italy. But it would in fact be unsafe to say that there is any general acceptance of the existence of any international legal duties in connexion with the application of conflicts rules. The principles upon which a particular State exercises generally its civil jurisdiction and the extent to which it admits or excludes the application of foreign law in actions before its courts are still, apart from particular treaties, within the *domaine réservé*. The harmony of municipal courts and municipal legal systems antedates the system of international law and is accepted rather than regulated by the latter.³ It operates largely upon a theory of law as territorial—as witness its

¹ Cf. *Re R.M. (Married Persons)*, decided by the Court of Appeal of Zürich in 1941 (*Annual Digest*, 1943-5, p. 279).

² *Anglo-Iranian Oil Co., Ltd. v. Jaffrate and Others*, [1953] 2 W.L.R. 46.

³ 'In [the Roman] system, in which only one state was contemplated, individual life was brought under legal ideas and rules, administered by courts which had to do justice in all the circumstances to which human activity might extend, and which have not the less continued to exercise that function because international sovereignty has arisen as a later product by their side, and the incidents with which they have been called on to deal have occurred under different sovereignties. Thus international law has had to recognise the jurisdiction of courts which are not international, as at least under certain conditions an authority in matters concerning individuals, even although the circumstances of the contest may be such that if history had been

continued invocation of the *lex situs* of property or *lex loci* of transactions.¹ According to the prevailing theory, moreover, it is maintained by force of the *lex fori*, whose authority again is based on the territorial view of law.² In the last resort, therefore, questions as to the area of jurisdiction and the application of a rule of one municipal system rather than another are territorial questions.

The utility of the analogy of the rules respecting acquisition and loss of territory depends, too, on how far the assumptions made as to the classification of territory are justified. Is it true that the world is divisible into areas under sovereignty and areas not under sovereignty, and that these sub-categories are further divisible into, respectively, areas under single and areas under multiple sovereignty, and into areas under some sort of control, single or multiple, not amounting to sovereignty, and areas under no sort of control at all? Perhaps it is true enough with respect to land areas, though even here the non-sovereign character of control over a colonial protectorate would appear to be ignored in the international sphere. But, by the same token, the circumstance that a State may treat the inhabitants of its colonial protectorates as aliens or as nationals of a subordinate class is largely ignored internationally.³ The real difficulty comes when attention is turned to the marine and submarine areas of the world. As respects the sea itself, States are committed to the theory that the acquisition of sovereignty over an area thereof is impossible. There is no very obvious category of natural persons concerning whom the analogous proposition may be advanced: that they may not be made the nationals of any State. Nevertheless, perhaps if the search is taken far enough it may be rewarding even here. For are not the inhabitants of mandated or trust territories, as such, incapable of assimilation to the status of nationals of any one State? Individuals among them may be naturalized—just as precise quantities of the waters of the earth may be reduced into possession and subjected to individual and exclusive use. But in their collective quality they have, as do the territories⁴ they inhabit—and as does the high sea—a status *in rem*.

The analogy of territory should not, however, be pushed too far. It will suffice to say that the rules as to who are a State's nationals are of the same order as the rules as to what is a State's territory. Their application is of both internal and external significance. They do not operate at all unless the State different it might have had to be settled by the direct action of states' (Westlake, *International Law*, 2nd ed. (1910), Part I, p. 248).

¹ As to the application of the *lex situs* in fact even in situations where the personal law of the *de cuius* is said to be applied, see the very interesting remarks of Griswold in *Harvard Law Review*, 51 (1938), pp. 1165, 1194-8.

² Cf. Dicey, *Conflict of Laws*, 6th ed. (1949), Introduction; Cook, *op. cit.*, ch. 3; Cheatham in *Harvard Law Review*, 58 (1945), p. 361. The literature as to the theory of the conflict of laws is of course enormous. But the works here referred to sufficiently illustrate the dominance of the 'vested rights' and/or 'local law' theories.

³ See above, p. 262, n. 1.

⁴ See above, p. 262, n. 3.

concerned performs an act of will. If a State disclaims the exercise of its discretion to acquire a new national, the position is similar to that in which a State disclaims the acquisition of further territory—as did the Four Powers, for instance, upon the defeat of Germany in the Second World War.¹ Similarly, if a State declines to assimilate all those who possess its nationality in an international sense to the same domestic category—as where it treats the inhabitants of a colonial protectorate as aliens for domestic purposes—this is normally a matter within its exclusive discretion just as is its decision whether or not to annex colonial protectorates themselves. As it happens, in this last instance the exercise of the State's discretion or the reverse is, with regard to the acquisition of both territory and nationals, of wholly internal significance. But, it may be asked, does not the parallel break down when abandonment rather than acquisition is involved? Is there not something in international law which inhibits States from the indiscriminate compulsory expatriation of their nationals? It is submitted that, if this be the case, as well it may be, it does not necessarily follow that there is no rule restricting the liberty of a State to abandon territory. In practice, where territory is abandoned it is either uninhabited or it is abandoned to another State or to the inhabitants, who organize for themselves a new State. Usually, there is some other State only too willing to take upon itself the burden of abandoned territory, or a sufficiently strong local political instinct to ensure the creation of a new State. However, the conception of trust for the inhabitants which has inspired all enlightened colonialism as well as the mandates and trusteeship systems,² surely suggests that a State has an inchoate duty not to abandon inhabited portions of its territory which are not politically and economically viable.

If then, the analogy sketched be accepted as useful, regard should be had to the circumstance that the general rule of international law is of 'the exclusiveness of a single sovereignty over the same territory'.³ As a consequence of the supreme quality of the authority which a State exercises over its territory, that authority is in principle indivisible. This leaning of the law towards the exclusiveness of territorial sovereignty, it is submitted, provides a key to its attitude towards nationality. International law does not necessarily assume that a person has a nationality, but that he does not normally have more than one nationality. The assumptions of the exclusiveness both of sovereignty and nationality are in fact extra-legal ones.⁴ The

¹ Cf. the terms of the Foreign Office Certificate presented to the Court in *R. v. Bottrill, ex parte Kuechenmeister*, [1946] 1 All E.R. 635, 636, reciting, *inter alia*, that 'The assumption [of] . . . supreme authority . . . does not effect the annexation of Germany', and that 'Germany still exists as a State . . .'.

² Cf. Hall, *Mandates, Dependencies and Trusteeship* (1948), p. 33.

³ Oppenheim, *op. cit.*, vol. i (7th ed., 1948), p. 409.

⁴ The 'object theory' of the individual, it is to be noted, requires that the individual shall be a national of a State to have any status in international law, but at the same time illogically concedes

relatively modern system of international law developed *ex hypothesi* after the emergence of the nation-State, with its pretensions to complete sovereignty, and necessarily assumed the existence of a plurality of independent States. In the same manner, it is apprehended, that system came to a society where individual membership of national communities was already regulated according to principles which ensured that no man should in general be a member of more than one such community. Perhaps these principles went farther than that and secured even that no man should be what would now be called stateless: for the lordless man was anathema to feudal law. Certainly there was the strongest possible prejudice against what is now termed plural nationality. Even today the plural national is very much the exceptional rather than the normal person. In times when travel was less easy, this was not less but more the case. But it was not the mere lack of movement of populations which excluded the exception so very largely. It was rather the harmony of nationality laws. In this connexion it is to be observed that the identity of the nationality laws of different countries will not of itself exclude plural nationality: if country *A* lays down that all persons born in *A* and also all persons born elsewhere of fathers born in *A* shall be *A* nationals, and *B* legislates similarly, then children born in either country of fathers born in the other are nationals of both. But the so-called 'rule of Europe'¹ did not combine the principles of the *jus soli* and the *jus sanguinis* in this manner. The *jus soli* operated to make a person a national of the country of his birth only if the *jus sanguinis* would produce the same result. A child born in France was thus a French subject only if his parents were French subjects.² And there are the strongest indications that until a remarkably late date the child of aliens born in England was not a subject of the King of England. Similarly, England for centuries displayed a resistance to the attribution of the status of a subject to the foreign-born child of English parents.³

The hypothesis that international law came to a ready-made harmony of municipal nationality laws and therefore had no need of rules of its own respecting nationality is a most appealing one and would explain many things—such as the territorial nature of the test of enemy character. Certainly the prime characteristic of European law at the time of the beginnings of international law was its territoriality. And to one or the other of these factors—the assumption by international law of a municipal legal harmony in matters of nationality, and the territoriality of municipal law—

'that interest and not membership of the State, determines which persons a State will make objects of its international rights and duties' (Manner in *American Journal of International Law*, 46 (1952), pp. 428, 429, 440, 441).

¹ Cf. Cockburn, *op. cit.*, p. 9.

² Cf. Vanel, *Histoire de la nationalité française d'origine* (1945).

³ Cf. the present writer's *British Nationality Law and the History of Naturalisation* (1954), and see below, p. 272, n. 5.

may be attributed the large reliance of municipal law on the principle of the *jus soli*. The *jus sanguinis*, as a principle of organization of tribes and such-like lesser communities, may indeed be older than the *jus soli*. But during the later Middle Ages the latter came so much to prevail that it has been frequently assumed to be the original rule.¹ It was more agreeable to the territorial conception of law than the *jus sanguinis*. The view of nationality as territorial, too, contributed to the rule that the effect of annexation or cession of territory was to divest the inhabitants of the territory affected of their original allegiance and to clothe them with that of the new sovereign. Specially negotiated exceptions to this rule occurring as early as 1641 testify to its antiquity.² A perhaps curious result of the frequent negotiation of such exceptions was the growth of a doctrine that the individual could opt between the old nationality and the new, coupled even with claims that the former persisted notwithstanding acquisition of the latter.³ Had emigration been more frequent, the recognition of the right of expatriation might have come earlier. For this too was consonant with the territorial view of law: if a sovereign permitted his subjects to depart and settle elsewhere, this concession of the right of emigration virtually compelled recognition of the effects of foreign naturalization, including automatic loss of original allegiance.

It is perhaps less vital to trace the origin or the details of the assumption of international law that there were adequate municipal rules respecting nationality and that these were sufficiently harmonious ordinarily to exclude plural nationality than to emphasize that such an assumption is implicit in the rule that each State is free, in general, to say who are its nationals and in the doctrine of freedom of acquisition of nationality by the individual. At first sight this rule and this doctrine appear to point in opposite directions, and to suggest that plural nationality should be more common than not, since they imply that each State may acquire nationals, and each individual nationalities, at will. But they clearly would not be workable at all unless each State in practice refrained from conferring nationality on a world-wide scale, and unless the acquisition of a new nationality by the individual were balanced by the loss of the old. Again, it is not damaging to the thesis, namely, that there was originally a common municipal legal principle according to which nationality was exclusive and to which international law came as to an extra-legal fact, that there is no longer any harmony of municipal laws in this regard. For just because the relevant principle for the determination of nationality was not one of international law but of general jurisprudence, it was susceptible of local amendment or change. Here the *jus soli* alone might be adopted, there the *jus sanguinis*

¹ Cf. above, p. 284, n. 4.

² Cf. Kunz, *Die völkerrechtliche Option* (1925).

³ Cf. *ibid.*; Flournoy in *Yale Law Journal*, 30 (1921), pp. 545 and 693; and *ibid.*, 31 (1922), pp. 702 and 848; and see below, p. 272.

alone, elsewhere differing combinations of the two. The result would be a conflict between the nationality systems of the several States destructive of the harmony originally assumed and accepted by international law and invalidating the negative principles of the exclusive control of domestic nationality and the unqualified recognition of foreign nationality constructed by international lawyers to take account of the extra-legal phenomenon of nationality. It is again no argument against an original principle of the exclusiveness of nationality, assumed by international law as an extra-legal fact, that States have found difficulty in recognizing the possibility of plural nationality. That would follow from their original lack of familiarity with such a possibility. Similarly, the circumstance that, since the development of the system of international law, States have adopted rules productive of plural nationality argues in favour of the view that at an earlier time they did not do so. For, when States changed their course in this manner, they found that international law put no obstacles in their way; it had no rules to cover the eventuality, for earlier no rules had been necessary.

It would seem to follow, therefore, that plural nationality is largely a modern phenomenon which has been permitted to occur because international law has in general no rules to prevent it, having failed to develop such rules simply because the phenomenon was not earlier encountered. The law leans against it because it has always assumed, as one of the facts upon the basis of which it has to operate, a fact that is akin to the facts of the plurality of States and their mutual independence, that there is a principle of exclusion of nationality to be deduced from municipal law in general. But international law, no less than municipal law, has become resigned to the new situation. Within broad limits plural nationality is, therefore, tolerated. Where the limit of toleration is reached is not, indeed, at all clear. The situation is, as the Hague Convention expresses it, that each State has the general right under its own law to determine who are its nationals, and that every other State has the general duty to acknowledge its determination in this regard.¹ But, as the United Kingdom put it at the Hague Conference, 'the right of a State to legislate with regard to the acquisition and loss of its nationality, and the duty of another State to recognize the effects of such legislation are not necessarily coincident'.² This was recognized in the Convention, the duty of recognition of foreign nationality legislation being expressed, as has been seen, to exist only in so far as that legislation may be 'consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality'.³

¹ See above, p. 256.

² League of Nations Document, C. 43, M. 18, 19, 26, V, p. 17.

³ See above, p. 256.

In this modern situation the mutual rights and duties of States with respect to an individual who simultaneously possesses their several nationalities are to some extent reconciled by the principle, also enshrined, as has been seen, in the Hague Convention, that one such State shall not seek to protect that individual against another.¹ But it is not, of course, only as between the States of which he is simultaneously a national that the problem of the peculiar status of the plural national arises. It may also arise for a third State. Here, again, difficulties are sought to be diminished by the so-called principle of the master-nationality. This is expressed in the Hague Convention in the following way:

'Within a third state, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third state shall, of the nationalities which any such person possesses, recognise exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected.'²

The acceptance of this principle serves to reaffirm the antipathy of international law to plural nationality.

A final provision of the Hague Convention which remains to be noticed in this context is the agreement of the parties to the effect that

'The inclusion of the above-mentioned principles and rules in the Convention shall in no way be deemed to prejudice the question whether they do or do not already form part of international law.'³

This careful avoidance of any implication as to what rules, if any, the customary law of nations has in relation to nationality underlines the imprecision of the circumstances in which a State is relieved of the duty to recognize the nationality law of another State.⁴ The duty exists only in so far as the law in question is consistent with 'international conventions, international custom and the principles of law generally recognised with regard to nationality'. The 'international custom' here referred to is not

¹ See above, p. 259.

² Article 5.

³ Article 18.

⁴ The Convention provides, apart from the Articles already quoted, for freedom of the individual to renounce a nationality when he has more than one (Article 6), for equality of status of married women in matters of nationality (Articles 8-11), for the exception of children of diplomatic envoys from the *jus soli* (Article 12), for the children of naturalized persons to follow their parents (Article 13), for foundlings (Article 14), and for adopted children (Article 17). It is supplemented by the International Protocol relating to Military Obligations in Certain Cases of Double Nationality (applying the master-nationality rule), the Protocol Relating to a Certain Case of Statelessness (applying the *jus soli* to the child of a woman being a national of the place of birth and a man of unknown or of no nationality), and the International Protocol concerning Statelessness (providing that in general the State of his last nationality shall receive back a criminal or indigent person becoming stateless elsewhere). The United Kingdom is a party to all these instruments. As to the modification of the law of the United Kingdom in accordance with their tenor (especially as to married women), see below, p. 275.

international customary law; and the 'principles of law' are not necessarily principles of international law.

In so far, however, as the Convention itself is part of international law for the States between which it is in force, and in so far as it leaves unaffected 'existing principles and rules of international law' applicable in relation to situations outside its scope, there may be said to exist an incipient international legal régime of nationality. But the content of this, apart from the Convention, is, for reasons already discussed, impossible of exact statement. The disharmony of municipal laws which has succeeded the original harmony has not yet been wholly regulated by international law, though that development is to be expected.

IV. *Plural nationality and the law of the United Kingdom*

(a) *The common law and the earlier statutory régime*

The rule *nemo potest exuere patriam* formed part of English law until the nineteenth century. The foreign naturalization of English or British subjects was therefore in a sense ignored domestically. But this was not altogether the case. Thus, as early as the reign of Henry VIII, Englishmen taking alien oaths were subjected to the higher rate of aliens' customs.¹ And there are several statutes of the eighteenth century penalizing emigrants who became naturalized abroad by depriving them of rights of inheritance.² Further, it must clearly have been realized that other countries were likely to insist on the same principle of indissoluble allegiance, so that the numerous aliens who were naturalized in England would be plural nationals. Indeed, evidence to this end is supplied by the eighteenth-century practice of stipulating that a naturalized person should lose the benefit of his naturalization if he resided abroad,³ and the nineteenth-century practices of both restricting the validity of passports issued to naturalized subjects to a period of six months and warning such subjects that they would not be protected abroad.⁴ Looking at the matter more

¹ 14 and 15 Henry VIII, c. 4.

² 5 Geo. I, c. 7; 23 Geo. II, c. 14.

³ Provisos of this sort were inserted in various private naturalization Bills introduced into the House of Lords in the latter half of the eighteenth century: cf. Shaw, 'Letters of Denization and Acts of Naturalisation for Aliens in England and Ireland, 1701-1800', in *Publications of the Huguenot Society of London*, 27 (1923), pp. 153, 178-9. 14 Geo. III, c. 84 (1774), required every Bill to contain a clause for disentitling a beneficiary from claiming 'within any foreign country any of the immunities and indulgences in trade which [were] or might be enjoyed or claimed therein by natural born British subjects, by virtue of any treaty or otherwise' unless he continued resident within the realm for seven years following his naturalization. This provision is the ancestor of the modern provision for revocation of naturalization on grounds of non-residence. It may be traced back as far as 22 Geo. II, c. 45, which provided that a person becoming naturalized on the basis of service in the whale fisheries should lose the benefit of his naturalization if he failed to reside in the country for twelve months at least.

⁴ The question of the degree to which the Crown was prepared to protect a naturalized British subject abroad was curiously confused with the really separate questions as to the extraterritorial

broadly, it is true that an English court would not allow possession by a subject of the nationality of an enemy State to constitute a defence to a charge of adhering to the enemy.¹ It is true also that the dissolution of the union of Crowns and consequent dissolution of the unity of allegiance of English and Scots was regarded by the Judges in *Calvin's* case as a mere theoretical possibility.² Considerable support for the doctrine of the indissolubility of allegiance is to be found in the circumstance that the inhabitants of the American colonies were considered to be subjects for some time after their successful revolt.³ The prejudice against plural nationality went so far as to be productive not only of the view that the native-born child of alien parents was not a subject,⁴ but also of a 'sort of hereditary doubt' as to whether the foreign-born child of English parents was a subject, even in the case where his father was in the service of the Crown.⁵ But

effect of local naturalization in colonies and the differences in status within British territory of natural-born and naturalized subjects. From 1852 the Foreign Office issued passports to 'local British subjects' but in 1863 circularized the consular service that such persons were not entitled to protection outside the colony concerned, nor to passports. These instructions were, however, reversed when in 1865 the Law Officers advised that local British subjects were entitled to the protection of the Government in every State other than any to which they might owe natural allegiance (*Report of the Royal Commissioners for Inquiry into the Laws of Naturalisation and Allegiance*, 1869, pp. 13-14). The Aliens Act, 1844, which inaugurated the first regular scheme of naturalization other than by private Bill, enabled grantees of naturalization thereunder to be dispensed by certificate of the Secretary of State from the disabilities as to holding public office or grants of Crown land imposed by the Act of Settlement and required to be specially stipulated in every private naturalization Act by 1 Geo. I, Sess. 2, c. 4. At first naturalization certificates granted under the Act were made unconditional. But in 1850, the practice was instituted of inserting a clause excepting 'any rights and capacities of a natural born British subject, out of or beyond the dominions of the British crown and the limits thereof'. From 1858 these words were further qualified by the addition of a clause reading: 'Provided always . . . that all the before-mentioned rights and capacities of a natural born British subject are granted . . . upon the condition that [the grantee] shall continue to reside permanently within the United Kingdom'; and naturalized persons were given only passports 'good for six months' (*ibid.*, pp. 9-10).

¹ *Proceedings against Aeneas Macdonald* (1747), 18 St. Tr. 858. Cf., however, the opinion of Lord Coleridge C.J. in *Isaacson v. Durant* (1886), 17 Q.B.D. 54, quoted above, p. 245.

² ' . . . less than a dream of a shadow, or a shadow of a dream' (7 Co. Rep. 1a, 27b).

³ Edmund Plowden was of this opinion, and tells the story how, when he represented to Pitt that some reprisal ought to be undertaken against the United States because British subjects were disabled as aliens from holding land there, 'Mr. Pitt drily replied that we had a character to keep up; the colonists had none' (*A Disquisition, &c.* (1818), pp. 34-35). Reeve, the legal historian, was of the same opinion, as were some others of his contemporaries (cf. Chalmers, *Colonial Opinions*, pp. 672 ff.).

⁴ Such a view is evidenced by (1) cases of naturalization or denization of persons born within the territories of the Crown, e.g. in Calais, Guienne, and various cautionary towns in English hands at the relevant times, or in the Channel Islands; (2) a Commons Bill of 1580 declaring English-born children of aliens themselves aliens unless made denizens (*Lords Journal*, ii, pp. 34 and 38; *Commons Journal*, pp. 122, 123, and 127); (3) the provisions of 13 and 14 Car. II, c. 11, imposing aliens' customs on the native-born children of aliens engaging in trade.

⁵ The phrase quoted is Plowden's. The statute *De Natis ultra Mare* (25 Ed. III, St. 2) was held in *De Geer v. Stone* (1882), 22 Ch. D. 243, to be declaratory of the common law only in so far as it purported to provide that the children of the sovereign born abroad were natural-born subjects, and to be enacting as respects the foreign-born children of subjects. However that may be, it was never completely accepted that the statute made a subject of the foreign-born child of a subject. This is shown by the numerous naturalizations of such children. The doubt extended even to the case of a child of an English ambassador abroad: cf. the House of Lords' debate on Sir Richard

none of these circumstances justifies the view that the concept of plural nationality was unknown to the common law.

The opinion in *Calvin's* case that, in the incredible event that the union with Scotland should be dissolved, Scots would then be *ad fidem utriusque juris*¹ may perhaps be disregarded as evidence in this context. Hale, however, was persuaded of the possibility of dual allegiance in the Norman and Angevin periods, and he is careful to distinguish between true dual allegiance and the case where a liege of one sovereign merely owes a lesser feudal duty to another.² In several cases, too, the Scottish courts held that persons born in the American colonies before the revolution and continuing to reside there afterwards had not become aliens by reason of their acquisition of a new allegiance to the United States.³ The tendency to hold the Americans still British subjects was ultimately reversed for wholly independent reasons, namely, that such was not the intent of the Treaty of Paris and that 'the inconvenience that must ensue from considering the great mass of the inhabitants of a country to be at once citizens and subjects of two distinct and independent states, and owing allegiance to each . . . ' constituted a factor in the interpretation of the Treaty.⁴

A final case which may be taken into consideration has a modern ring about it. This was *Drummond's* case,⁵ decided in 1834, which came before the Privy Council on appeal from the Commissioners for the Liquidation of British Claims on France. The Commissioners were appointed to execute Article 9 of the Treaty of Paris of 1815, whereby France undertook to restore to British subjects properties seized by the revolutionary régime. The issue was whether the appellant was a British subject for this purpose. He had been born in France and so had his father. But his grandfather had been born in Scotland, so that, under the British Nationality Acts, 1730 and 1773, he was a British subject. But, as the Privy Council observed, 'He might be a British subject and might also be a French subject; and if he

Fanshawe's case in 1666: Shaw, 'Letters of Denization and Acts of Naturalisation for Aliens in England and Ireland 1602-1700', in *Publications of the Huguenot Society of London*, 18 (1911), p. 98. Possibly it extended even to that of royal progeny. Certainly Elizabeth I refused to restore the Lennox lands in England to James VI (which he could hold only if he were not an alien) lest it should prejudice the succession question (Stafford, *James VI of Scotland and the Throne of England* (1940), p. 251). Because of this doubt the statute 5 Ann., c. 8, was thought to be called for to go over exactly the same ground. Even after this step it remained unclear what the position of the foreign-born child of British parents was, and during the eighteenth century there were cases in which such a child was naturalized by private Bill. The present writer has found a considerable number of such cases. In short, the extent to which the *jus sanguinis* operated as a part of English or British law was uncertain until the decision in *De Geer v. Stone*, and the limitation of its effect to the second foreign-born generation as a result of that decision was probably fortuitous.

¹ 7 Co. Rep. 1a, 27b.

² 1 Pleas of the Crown, 68.

³ *Stewart v. Hume*, 6 Morrison's Dict. of Decisions, 4649; *Gordon and Scott v. Brown* (1810), unreported, referred to 2 B. and C. 791; *Shedden v. Patrick* (1854), 1 Macy, 525.

⁴ *Doe d. Thomas v. Acklam* (1824), 2 B. and C. 779, at p. 798 (*per* Abbott C.J.).

⁵ 2 Knapp, 295.

were a French subject, then no act done towards him by the Government of France could be considered an illegal act, within the meaning of the treaty . . .'.¹ In consequence of a finding that the claimant was in fact also a French national, his claim was finally dismissed. The decision does not, of course, turn on strict municipal law. But it clearly implies a familiarity with the phenomenon of plural nationality.

The Naturalization Act, 1870,² was largely designed to take account of, and as far as possible to exclude, cases of plural nationality. For its purpose was to put an end to the long controversy with the United States which had been partly responsible for the War of 1812.³ Plural nationality as a result of foreign naturalization was excluded.⁴ The possibility of the acquisition of plural nationality by a woman who was a British subject, through her marriage with an alien, was likewise excluded.⁵ And in any case where plural nationality arose at birth, the individual concerned was enabled to divest himself of British nationality.⁶ But, so far as concerns the Act's purported expatriation of married women of British origin, the Legislature was, of course, influenced rather by the principle of the unity of nationality of spouses. This same principle indeed led to the positive encouragement of plural nationality in the reverse case of an alien woman marrying a British subject. For such a woman was transformed into a British subject herself, without regard to whether or not she lost her foreign nationality on marriage.⁷

With minor modifications the position as established by the Naturalization Act, 1870, remained the same until 1949. One such modification was, curiously perhaps, introduced by the courts rather than the Legislature. For it was held or implied that, despite the clear words of the statute, a British subject becoming naturalized in time of war in an enemy State did not thereby cease to be a British subject, and even that a declaration of alienage was ineffective to divest British nationality in time of war.⁸ As for

¹ 2 Knapp, at p. 312.

² 33 and 34 Vict., c. 102.
³ See generally Jones, *op. cit.*, ch. iii. A large motive for the Act was the necessity for implementing the Bancroft Convention of 1870 for the mutual recognition of naturalization.

⁴ S. 6; re-enacted by the Act of 1914, s. 13.

⁵ Act of 1870, s. 10 (1); Act of 1914, s. 10 (1). As to the later modification of this rule see below.

⁶ Indeed, the Legislature went further than the policy of merely avoiding plural nationality demanded, and indirectly both recognized and in a sense encouraged cases of statelessness. For not only was a British subject born in British territory permitted to execute a declaration of alienage if he had acquired a foreign nationality at birth and had retained it, but the like liberty was accorded to a British subject born elsewhere, irrespective of whether he had ever acquired, or retained, any foreign nationality (Act of 1870, s. 4; Act of 1914, s. 14). As to the judicial interpretation of this rule and its subsequent modification, see below, especially n. 8.

⁷ Act of 1870, s. 10 (1); Act of 1914, s. 10 (1). This rule in fact dated from the Aliens Act, 1844 (7 and 8 Vict., c. 66, s. 16). As to its subsequent modification see below.

⁸ As regards naturalization in an enemy State, this was the plain implication of *R. v. Lynch*, [1903] 1 K.B. 449, and *Ex parte Freyberger*, [1917] 2 K.B. 129, as it was also of *Vecht v. Taylor* (1917), 116 L.T. 446, *Dawson v. Meuli* (1918), 118 L.T. 357, *Gschwind v. Huntingdon*, [1918] 2 K.B. 420, and *Sawyer v. Kropp* (1916), 85 L.J.K.B. 1446, with respect to declarations of alienage,

changes by statute, it was sought in 1914 to diminish the number of cases in which plural nationality could arise by abrogating the eighteenth-century rule¹ that the child of a British subject born abroad was himself such a subject not only if his father, but also if merely his paternal grandfather, had been born in British territory. The hardship which this limitation produced led, however, to the replacement of the original 'grandfather rule' by a device for the consular registration of births of children of British subjects abroad which was ultimately so generalized as to permit the acquisition of British nationality by, in effect, mere descent even beyond the second generation.² Finally, it was sought, also by statute, to modify the earlier inept provisions concerning married women. To some extent the policy here was to avoid statelessness. Thus, it was provided that a woman who was a British subject and who married an alien should not cease to be a British subject unless on marriage she acquired the nationality of her husband.³ But in amending the law as it affected married women the Legislature was less concerned to observe a rule that every person should have one nationality and one only, than to concede equality to the sexes in matters of acquisition and loss of nationality. In conformity with this wider policy a woman who was a British subject married to a person becoming an alien, e.g. by foreign naturalization, was permitted to execute a declaration of retention of British nationality notwithstanding that she might have acquired her husband's new nationality.⁴ The rule that the wife of a British subject was always such a subject was modified only to the extent that the wife of a person becoming, subsequently to the marriage, a British subject by naturalization did not herself become such a subject unless she executed a declaration of intention to acquire British nationality.⁵ The tide, in short, was turning in favour of increased toleration of plural nationality.

whether executed in virtue of simultaneous possession either of enemy or of mere neutral nationality. But these decisions run counter to the clear words of the statutes (Act of 1870, s. 6; Act of 1914, s. 13). Moreover, the rule upon which they purport to rely was unnecessary for the adjudication of the issues in them. The true rule should have been that to become naturalized in an enemy State was treasonable and that, though either so to become naturalized or to execute a declaration of alienage was effective to divest British nationality, acquired liabilities as a British subject remained in virtue of the provision of s. 15 of the Act of 1870 or s. 16 of the Act of 1914 to the effect that a British subject becoming an alien was not thereby 'discharged from any liability in respect of any act done on or before the date of his so becoming an alien'. The recognition of at least some effects of naturalization in an enemy State in *Re Chamberlain's Settlement*, [1921] 2 Ch. 533, supports this construction. So also does the enactment by the British Nationality and Status of Aliens Act, 1943 (6 and 7 Geo. VI, c. 14, s. 7) of the rule that a declaration of alienage shall be of no effect in time of war unless registered with the permission of the Secretary of State, which rule is reproduced, *mutatis mutandis*, by the British Nationality Act, 1948, s. 19 (1).

¹ This rule was introduced by the British Nationality Act, 1772 (13 Geo. III, c. 21). Compare the Act of 1914, s. 1 (1) (b), as it originally read.

² Act of 1914 (as amended 1922), s. 1 (1) (b) (v); Act of 1943, s. 1 (2).

³ Act of 1914 (as amended in 1933), s. 10 (2). The same rule was made to apply in the case of the husband's ceasing to be a British subject during the subsistence of the marriage (s. 10 (3)).

⁴ *Ibid.*, s. 10 (4).

⁵ *Ibid.*, s. 10 (5).

(b) The distinction between nationality and citizenship

It has been shown above that the law of the United Kingdom had not, at least prior to 1949, developed a concept of British nationality. It employed instead the concept of the British subject. But the class of British subjects was not coincidental with that of British nationals: British protected persons, whether so called or not, though domestically aliens, were also British nationals.¹ The British Nationality Act, 1948, still employs the concept of the British subject. It has also adopted the term 'British protected person'. These terms are, however, now employed in somewhat different senses than was the case before the Act. That is to say, at the present time the quality of being a British subject depends in general not upon the direct application to the individual of rules as to place of birth or naturalization and so forth, but is derived from the quality of being a citizen either of the United Kingdom and Colonies or of some other community of the Commonwealth.² Moreover, the class of British protected persons *eo nomine* has been extended to include virtually all non-subjects whom the Crown protects³ and is no longer confined to the inhabitants of African territories without native rulers which are under British protection. It does not, however, follow that the sum total of United Kingdom nationals can be arrived at by the addition of the categories of British subjects and British protected persons. Such an addition may result in the inclusion of classes of individuals whom other States are not bound to recognize as United Kingdom nationals.

In attempting to determine who are now United Kingdom nationals the title of the British Nationality Act, 1948, may be ignored. That follows a fashion which is attributable to the influence of continental nomenclature corresponding to no concept known to the common law. But all that is not in the statute, and in particular the common law rules as to who is a subject must also be ignored. It may well be that the inept wording of the Act has not resulted in the exclusion of the common law altogether.⁴ In this connexion it may be recalled that the common law rules have in the past been invoked to override the plain words of statutes regulating the acquisition and loss of the status of a British subject.⁵ It was, however, clearly the intention of the Act of 1948 to set up a scheme in which the common law rules had no part. And it is possible that the courts, in interpreting the Act, may be inclined to overlook its insufficiencies because it is a measure agreed upon with part at least of the rest of the Commonwealth, to which ideally

¹ See above, p. 257.

² Act of 1948, s. 1.

³ See the British Protectorates, Protected States and Protected Persons Order, 1949 (S.I., No. 140), and the amending Orders, 1952 (S.I., Nos. 457, 1417). But see below, p. 277, as to the inhabitants of mandated and trust territories.

⁴ See above, p. 246, n. 4.

⁵ See above, p. 274.

the canons of construction of treaties rather than of statutes should perhaps apply.

It may be conceded that the category of citizens of the United Kingdom and Colonies which the Act creates are unquestionably British nationals. The same may be said with respect to the category of British protected persons at the other end of the scale. But here a caveat may be necessary: the class of British protected persons is capable of being extended¹—thought it has not been extended as yet—to include persons connected with a mandated or trust territory under the administration either of the United Kingdom or of another part of the Commonwealth. The right of the United Kingdom to protect inhabitants of a mandated or trust territory under United Kingdom administration is indisputable; the like right in respect of any other mandated or trust territory is more doubtful;² and the right of a State administering a mandated or trust territory to assimilate the inhabitants to its own nationals is likewise doubtful.³

But it is with categories intermediate between citizens of the United Kingdom and Colonies and British protected persons that real difficulties arise. There are three such categories—citizens of other countries of the Commonwealth, British subjects without citizenship, and Irish citizens. The second of these is a transitional one which must soon disappear, persons within it becoming either citizens of some other country of the Commonwealth or United Kingdom citizens, so that it may here be disregarded.⁴ As to citizens of other countries of the Commonwealth, they are, along with citizens of the United Kingdom and Colonies, statutory British subjects in virtue of their several citizenships.⁵ They are outside the category of aliens.⁶ Are these non-citizen British subjects, however, nationals of the United Kingdom, as are citizen British subjects—using the term ‘citizen’ here to denote exclusively a citizen of the United Kingdom and Colonies? In a strictly domestic sense they could be so regarded, if there were any domestic legal concept of United Kingdom nationality as such. For, when the rights and capacities of citizen and of non-citizen British subjects are compared, it is revealed that the only distinction between the latter and the former is the paradoxical one that the latter are not the former! A British subject who is not a citizen of the United Kingdom and Colonies is in exactly the same legal situation as a British subject who is such a citizen, so far as the law of the United Kingdom is concerned. And even the distinction without a difference between citizen and non-citizen subjects is diminished by the circumstance that every non-citizen subject has, in all but very

¹ British Nationality Act, 1948, s. 32 (1).

² See below, p. 280, as to the protection of citizens of other countries of the Commonwealth.

³ See the literature cited in Oppenheim, *op. cit.*, vol. i (7th ed., 1948), footnotes to pp. 200–2.

⁴ See below, pp. 289–90.

⁵ British Nationality Act, 1948, s. 1.

⁶ Cf. *ibid.*, s. 32 (1).

exceptional circumstances, the right to become a citizen on the satisfaction of a minimal requirement as to residence.¹ If the test of privilege under the law is the decisive one, therefore, all British subjects are United Kingdom nationals from the domestic point of view.

If the test of privilege were the decisive one, however, it would be necessary to come to the same conclusion with respect to citizens of the Republic of Ireland. For they also, along with non-citizen subjects, are outside the category of aliens.² They are indeed not within the statutory category of subjects as such, but, as has been seen, the law of the United Kingdom is, for the present at least, to continue to apply to them as if they were subjects.³ And the difference in effect between a statutory declaration that a state of affairs is, and that it is to be deemed to be, is non-existent. Yet, since the Ireland Act, 1949, there is no such constitutional justification for the assimilation of citizens of the Republic of Ireland to the condition of nationals of the United Kingdom—or of subjects of the Crown—as there may be for the like assimilation of citizens of other parts of the Commonwealth. The Republic of Ireland, though paradoxically it is not a foreign country,⁴ is not now part of the dominions of the Crown.⁵

The Act of 1948 could have provided merely that the only distinction between citizen-subjects on the one hand and non-citizen subjects and Irish citizens on the other was that the latter were not the former. As has been seen, so far as concerns privileges it did so provide. But it drew, or purported to draw, a more real distinction between the two classes in respect of liabilities under the law. For it provided that neither non-citizen subjects nor Irish citizens should be amenable to United Kingdom criminal law in respect of conduct in any other country of the Commonwealth or in the Republic of Ireland or in any foreign country, unless such conduct, had it occurred in a foreign country, would have constituted an offence in an alien.⁶ In order to elucidate the effect of this concession—to which there is, incidentally, a proviso saving any offence under the Merchant Shipping Acts—it must be determined when conduct in a foreign State constitutes an offence under the law of the United Kingdom. What is in question here is of course an offence which is deemed to take place in a foreign State, and not conduct amounting to an offence the *locus* of which is construed to be within the United Kingdom. It would appear that treason and treason-felony certainly are such offences, as are also murder, manslaughter, bigamy, perjury, receiving, and also offences under the Foreign Enlistment Act, Official Secrets Acts, Incitement to Mutiny Act, Unlawful Oaths Acts, Dockyards Protection Act, and the Explosive Substances Act.⁷ But how far are these

¹ British Nationality Act, 1948, s. 6 (1), (3).

³ *Ibid.*, s. 3 (2).

⁵ *Ibid.*, s. 1 (1).

² Cf. *ibid.*, s. 32 (1).

⁴ Ireland Act, 1949, s. 2 (1).

⁶ *Ibid.*, s. 3 (1).

⁷ Cf. *Archbold's Criminal Pleading, Evidence and Practice*, 32nd ed. (1949), pp. 26–30.

offences if committed by aliens? In most cases, clearly, they are not offences in an alien—for instance, murder and bigamy.¹ It follows that, because of the exemption referred to, the liabilities of non-citizen subjects are to some extent less than those of citizen subjects. But the difference is not great because of the relatively small extent to which extraterritorial criminal jurisdiction is exercised with respect even to citizens.

It must be a matter of opinion whether greater weight is to be attached to the slight disparity in liabilities or to the parity in rights of citizen subjects and non-citizen subjects for purposes of deciding whether the latter, and equally Irish citizens, are to be considered nationals of the United Kingdom for domestic purposes. Perhaps some assistance as to how to weight these factors can be derived from a comparison of the present situation of British protected persons. Formerly persons within this class were considered to be aliens for internal purposes. They are now not aliens for the purposes of the British Nationality Act itself, nor yet for the purposes of the Aliens Restriction Acts.² For what purposes, then, do they remain aliens? The answer would appear to be that they are aliens only in the context of the restrictions upon the holding of public offices and the taking of Crown grants first imposed by the Act of Settlement.³ Their situation is thus similar to that of naturalized subjects in the eighteenth century and is in general nearer to that of the subject than to that of the alien.

Turning now to the international aspect of the status of non-citizen subjects and Irish citizens, it may be said with some confidence that the Republic of Ireland would not be debarred from prosecuting an international claim against the United Kingdom on behalf of an Irish citizen by the mere circumstance that such a citizen is entitled to the privileges of a British subject in the United Kingdom. On the other hand, it is arguable that international claims do not in any case lie between members of the Commonwealth and that, to the extent that the 'common clause' is accepted by any such member, it is not open to that member to deny that its citizens are nationals of the United Kingdom. The intermediate case of a claim by the Republic of Ireland on behalf of an Irish citizen who was also a non-citizen subject, e.g. an Australian citizen, would be a difficult one. For it would not be easy to apply a principle of 'master-citizenship' analogous to the principle of master-nationality:⁴ a plural citizen within the complex of Commonwealth countries and the Republic of Ireland does not

¹ It is believed that the following statement in *Archbold*, op. cit., at p. 26, is correct: 'A foreigner is not liable under English law for an offence committed on land abroad, except in the case of treason where . . . [the rule in] *Joyce v. Director of Public Prosecutions*, [1946] A.C. 347 [as to which see above, p. 258] [applies].'

² British Nationality Act, 1948, ss. 3 (3), 32 (1).

³ See the present writer's *British Nationality* (1951), ch. 4.

⁴ See above, p. 270.

necessarily reside in any country of which he is a citizen, nor is he necessarily more closely connected with one such country than another, as the following example will show. *A* was born in Australia. On the outbreak of the First World War he joined the Australian forces and his son *B* was born in Ireland during his service there. Having acquired a family, *A* decided to enter employment in England. *B*, who has lived practically all his life in the United Kingdom, is not a citizen of the United Kingdom and Colonies, though he is both an Irish citizen and an Australian citizen: he has no closer connexion with the one of these countries than with the other.

Foreign States are certainly not bound to recognize that the 'common clause' has any effect in relation to them. The question therefore arises whether, for instance, the United States can present an international claim against the United Kingdom with respect to a person who is both an American national and, for example, an Australian citizen or an Irish citizen. It is difficult to see how a claim on behalf of an American national-Irish citizen at least could be held to be barred by the principle of nationality of claims. Before offering any opinion on the case of the American-Australian, it is well to pose the reverse problem of a claim by the United Kingdom against a foreign State with respect to an Australian citizen. And before any hasty decision is made that such a claim cannot lie because an Australian citizen is not a United Kingdom national, it is well to consider the alternative of a claim by the United Kingdom against a foreign State with respect to a Southern Rhodesian citizen. The United Kingdom still has complete control of the foreign affairs of Southern Rhodesia (as, indeed, it still plays a role in the foreign relations of at least some other of the Commonwealth countries). It is to be recalled in this connexion that the *I'm Alone*¹ claim was presented by the United Kingdom on behalf of Canada at a time when the latter country had already achieved such a hallmark of international personality as independent membership of the League of Nations. Admittedly, at that time the theory of the common Crown was in greater vogue than it now is. But it is still the practice that the whole Commonwealth is represented by the United Kingdom missions in places where there are no separate missions from the other countries of the Commonwealth.

Perhaps, therefore, no definite answer can be given as to whether citizens of the other countries of the Commonwealth are 'nationals' of the United Kingdom in either a domestic or an international sense. But it may be hazarded that the ultimate answer must be a negative one. For, as regards the domestic side of the question, it is to be observed that the 'common clause'² has not been accepted in its original form everywhere within

¹ (1933): see *Annual Digest*, 1933-4, Case No. 86.

² See above, p. 247, n. 2.

the Commonwealth. Moreover, though the law of the United Kingdom encourages rather than discourages plural citizenship within the Commonwealth and thus continues to support the principle of a common Commonwealth status, of which the equality of treatment of all British subjects is an aspect, this is not, as is perhaps not generally realized, the case everywhere in the Commonwealth. And, as regards the international aspects of national status, foreign States cannot fail to be impressed by the circumstance that the several parts of the Commonwealth have several schemes of citizenship and will tend to look to the circumference rather than the centre in any question concerning the national status of a British subject who is not a citizen of the United Kingdom and Colonies. Moreover, the continuance of the representative role of the United Kingdom in international relations depends on the willingness of that country to continue in that role. The degree to which citizens of the other countries of the Commonwealth are discouraged from carrying United Kingdom passports would seem to point to a decline of that willingness in the context of the protection of individuals abroad.

(c) *The incidence of plural nationality after 1948*

An incidental argument in favour of the view that citizens of other countries of the Commonwealth are not nationals of the United Kingdom is that the Act of 1948 has conceded the possibility of the simultaneous enjoyment of foreign nationality with citizenship of the United Kingdom and Colonies to the same extent that it concedes that of plural citizenship within the Commonwealth. Plural citizenship within the Commonwealth was perhaps unavoidable having regard to the ties of blood which continue to exist and the still significant degree of intra-Commonwealth migration. It was therefore natural to provide that acquisition of citizenship of another country of the Commonwealth should not produce loss of citizenship of the United Kingdom and Colonies, though it is to be observed that the majority of the other Commonwealth countries have not legislated to corresponding effect. There was less necessity to provide, as has also been done, that foreign naturalization should not, either, have this effect. Perhaps the motive here was the distinct one of excluding as far as possible cases of statelessness—a precaution which was singularly neglected in connexion with the acknowledgement of the independence of Burma.¹ But this is not the only change

¹ S. 2 of the Burma Independence Act, 1947 (11 Geo. VI, c. 3), read with the Final Schedule thereto, caused to cease to be British subjects as from the appointed day (4 January 1948) all persons born in Burma and also all persons born of fathers or grandfathers there born, unless themselves born elsewhere in British territory. A person born in France whose father and grandfather were born in Burma thus ceased to be a British subject thereunder. The right to elect to remain a British subject was, however, given to any person affected who was domiciled or permanently resident in British territory. But this right would not be available to the person in the example given if he were domiciled in France. Moreover the right, where it existed, had to be

made which will tend to increase the incidence of plural nationality—using that expression to connote simultaneous possession of citizenship of the United Kingdom and Colonies and of the nationality of a foreign State, as distinct from simultaneous possession of that citizenship and of citizenship of another country of the Commonwealth. For there has in effect been restored also the common law rule that marriage has no effect on nationality. That is to say, a woman citizen of the United Kingdom and Colonies in no case loses her status as such by reason of her marriage, though a woman non-citizen who has been married to a citizen of the United Kingdom and Colonies has the indefeasible right to become such a citizen herself. These changes do not, however, involve the restoration of the rule *nemo potest exuere patriam*. On the contrary, a person who simultaneously possesses citizenship of the United Kingdom and Colonies and a foreign nationality is enabled to divest himself of the former status freely in time of peace, and with executive permission in time of war.¹

It is possible to classify the principal cases in which a citizen of the United Kingdom and Colonies may also be a foreign national as follows:

(i) Where any person born in any part of the United Kingdom and Colonies is a foreign national *jure sanguinis*, e.g. where such person was born in wedlock in England of French parents,² or out of wedlock in the Channel Islands of a French mother,³ or in wedlock in Trinidad of an American mother.⁴

(ii) Where any person is born in a foreign State in such circumstances that he is a citizen of the United Kingdom and Colonies by descent⁵ and is also a national of the foreign State, either *jure soli* or *jure sanguinis*. This case can only arise where the person concerned is born in wedlock or is legitimated *per subsequens matrimonium*. It might arise, for example, in the case of a child born in Argentina, such child being an Argentine national exercised within two years. In some cases, therefore, the opportunity to remain a British subject was lost through delay. This was particularly hard in the case of infants whose parents or guardians failed to execute on their behalf the requisite declaration. And since a declaration by a parent or guardian was effective only with respect to an infant under the age of eighteen, cases occurred in which infants lost the status of British subjects even without default on the part of the parents or guardians. As the combined effect of the Constitution of Burma and the (Burmese) Union Citizenship Act, 1948, is broadly to restrict Burmese citizenship to the indigenous races of Burma and to resident members of families of other races settled in Burma, some of these cases resulted in instances of statelessness.

¹ British Nationality Act, 1948, s. 19.

² Cf. Article 17 (1) of the French Law of 19 October 1945: *Journal Officiel*, 20 October 1945, p. 6700.

³ Cf. *ibid.*, Article 19 (1).

⁴ Cf. United States Immigration and Nationality Act, 1952 (66 Stat. 163), s. 30 (7).

⁵ I.e. because his father was at the time of the birth (or such father's own prior death) either a citizen otherwise than by descent (i.e. by birth, naturalization, registration, adoption, or incorporation of territory) or because his father was a citizen by descent but was either in Crown service under the Government of the United Kingdom at the time of the birth or was himself born in a place where the Crown then exercised extraterritorial jurisdiction, provided in this case that the birth was registered at a consulate of Her Majesty (Act of 1948, ss. 5, 23, 24).

jure soli and also a United Kingdom citizen by descent in virtue either of the condition of his father, or of that condition and the fact of appropriate registration of the birth.

(iii) Where any person becomes a citizen of the United Kingdom and Colonies, by naturalization or, in the case of an infant, by registration, without thereby losing his original foreign nationality.¹

(iv) Where any person who is a citizen of the United Kingdom and Colonies becomes naturalized in a foreign State and does not renounce his citizenship of the United Kingdom and Colonies.²

(v) Where any woman citizen of the United Kingdom and Colonies acquires a foreign nationality by marriage or in virtue of the foreign naturalization of her husband and does not renounce her citizenship of the United Kingdom and Colonies.³

(vi) Where any woman foreign national who has been married to a person who is or subsequently becomes a citizen of the United Kingdom and Colonies exercises her statutory right to become such a citizen herself and continues nevertheless to retain her foreign nationality.⁴

(vii) Where any person who is simultaneously a foreign national and a citizen of any other country of the Commonwealth or of the Republic of Ireland becomes a citizen of the United Kingdom and Colonies by registration in virtue of his citizenship of another country of the Commonwealth or of the Republic of Ireland and continues to retain his foreign nationality.⁵

(viii) Where a child of foreign nationality is adopted in virtue of an adoption order made in the United Kingdom and becomes thereby a citizen of the United Kingdom and Colonies because the male adopter is such a citizen and does not lose his foreign nationality.⁶

¹ Act of 1948, ss. 10, 7. The most frequent case will be that in which an infant is registered as a citizen, the foreign law concerned not treating that circumstance as a ground for loss of nationality because of the incapacity of the person concerned. It should be noted that an infant cannot become 'naturalized' in the United Kingdom, though he may acquire citizenship at discretion through registration.

² This result follows from the failure of the Act of 1948 to contain any provision parallel to s. 13 of the Act of 1914, as to which see above, p. 274. It is, however, not necessarily the case that a citizen of the United Kingdom and Colonies can retain his citizenship and a foreign nationality which he acquires by naturalization. Admittedly he has no capacity to renounce his citizenship until he has acquired a foreign nationality, but the law of the foreign State concerned may treat him as having procured naturalization by fraud unless he renounces United Kingdom citizenship as soon as he is able. Cf. *Schurmann v. United States* (1920), 264 F. 917.

³ Cf. the parallel case before 1949 (see above, p. 275).

⁴ Cf. the parallel case before 1949 (see above, p. 275). The right of such a woman to acquire citizenship is not absolute if she has previously been a citizen of the United Kingdom and Colonies and has renounced her status as such (Act of 1948, s. 6 (2), (3)).

⁵ There was of course no parallel before 1949 to this case. In it the plural status of the *de cuius* by the law of the country (i.e. another country of the Commonwealth or of Ireland) in virtue of which, under s. 6 of the Act of 1948, he is entitled to become a citizen of the United Kingdom and Colonies by registration must be postulated. In fact not every country of the Commonwealth tolerates plural status (see below, pp. 285 ff.).

⁶ Cf. Adoption Act, 1950 (14 Geo. VI, c. 26), s. 16.

It needs to be added by way of a footnote to the foregoing list that the Act of 1948 has pursued a retrospective policy in regard to the restoration of the rule that marriage shall not have any effect on the nationality of women and has restored their original status to many women who lost British nationality on or during marriage before 1949.¹ Further, it has assimilated the category of locally naturalized persons, the existence of which is excluded as to the future, to that of British subjects in the full sense.² It has also restored British nationality to any person who acquired it by the consular registration of his birth but lost it again through failure to execute a declaration of retention.³ It has, again, provided for the retrospective treatment as a British subject of any person who would have become such had his birth been registered at a consulate before 1949, and whose birth is so registered retrospectively after 1948.⁴ The result of these provisions, all of which are purely transitional, is to provide additional instances in which plural nationality may for the time being arise.⁵

On the whole it is clear that the incidence of plural nationality must have been increased by the Act of 1948. Where it may occur has been indicated above. Whether in a given case it does occur depends, however, as much on foreign law as on the law of the United Kingdom. But, as has been said, where it does in fact occur it may be cured by the renunciation of citizenship of the United Kingdom and Colonies. In this connexion it is perhaps useful to draw attention to a practical difficulty. Possession of a foreign nationality is of course to be tested by the 'proper law' of the nationality concerned—the law of the State of that nationality. This question of law is, however, a question of fact for the United Kingdom authorities concerned. Where a person seeks to renounce citizenship of the United Kingdom and Colonies on the basis of possession of a foreign nationality, it is understood that the question whether he does or does not possess that nationality is referred to the diplomatic mission of the State concerned. The Ministry of Foreign Affairs of a State is not necessarily empowered to determine questions of law. The case might thus arise of a woman naturalized American citizen who had been married to a British subject before 1949 and who became in virtue of the Act of 1948 a citizen of the United Kingdom and Colonies, seeking to renounce her citizenship. Upon reference to the United States diplomatic mission the opinion might be expressed that she had ceased to be an American citizen by continuous foreign residence. This determination would lead to the issue of a 'certificate of loss' of

¹ British Nationality Act, 1948, s. 14.

² *Ibid.*, s. 32 (6).

³ *Ibid.*, s. 15. Cf. also s. 16 as to resumption of the status of a British subject by persons losing that status during infancy before 1949.

⁴ *Ibid.*, s. 17.

⁵ During a transitional period the existence of a class of British subjects without citizenship has also to be taken into account. To this class the rules as to the status of British subjects before 1949 continue to apply (Act of 1948, s. 13, and Third Schedule). See further below, pp. 289–90.

American citizenship, and thereafter the mission would certainly refuse to certify to the United Kingdom authorities that the person concerned was an American citizen. But it would not constitute a legal ruling that she was not such a citizen. However, to obtain from the courts a ruling in the contrary sense would put her to considerable trouble and expense.¹

(d) *The incidence of plural citizenship*

The relatively small size of the Commonwealth makes it possible within a comparatively small space to indicate not only where citizenship of the United Kingdom and Colonies may co-exist with citizenship of another country of the Commonwealth but where in fact it does so co-exist. For in order to determine this it is necessary only to look at the law of nine countries—or of ten, if, as is convenient, the Republic of Ireland is considered also. And even this task is not as great as might at first appear because of the common origin of the law of the countries concerned and the high degree of unity between their citizenship laws and the British Nationality Act. Taking the countries which come in question in order, the position is as follows:²

(i) *New Zealand*. The citizenship law of New Zealand is, *mutatis mutandis*, almost exactly the same as that of the United Kingdom. As a result the possibility of plural citizenship reaches its maximum. The New Zealand-born legitimate child of a father who is a citizen of the United Kingdom and Colonies by any title other than mere descent is a New Zealand citizen³ and also a citizen of the United Kingdom and Colonies;⁴ conversely, the child of a New Zealand citizen otherwise than by descent born within the United Kingdom and Colonies is likewise a dual citizen.⁵ A woman citizen of either country marrying a citizen of the other has the indefeasible right to acquire the citizenship of her husband without forfeiting her original citizenship.⁶ A citizen of the one country who has resided twelve months in the other has a similar right to acquire citizenship of that other without losing his original citizenship.⁷ But there is one practical limitation: the rigidly discriminatory immigration policy of New Zealand will in many

¹ Cf. United States Immigration and Nationality Law, 1952, ss. 358–60.

² This tabulation ignores in general: (1) the possible effect of legitimation *per subsequens matrimonium* under s. 23 of the British Nationality Act; (2) the possible effect of an adoption order made in the United Kingdom (as to which see above, p. 283); and (3) possible cases of plural citizenship arising from the operation of transitional rules.

³ British Nationality and New Zealand Citizenship Act, 1948 (No. 15) (N.Z. Act), s. 6.

⁴ British Nationality Act, 1948, s. 5. So also if the father, being a mere citizen by descent, was in Crown service at the time of the birth, or was himself born in a place subject to extraterritorial jurisdiction.

⁵ N.Z. Act, s. 7.

⁶ British Nationality Act, 1948, s. 6 (2); N.Z. Act, s. 8 (2).

⁷ British Nationality Act, 1948, s. 6 (1); N.Z. Act, s. 8 (1). Cf. however § (3) of each relevant section. An infant may be registered at discretion (British Nationality Act, 1948, s. 7; N.Z. Act, s. 9).

cases exclude the possibility of acquisition by citizens of the United Kingdom and Colonies of non-Caucasian race of the residence qualification for admission to New Zealand citizenship by registration.

(ii) *Australia*. Although dual citizenship of Australia and the United Kingdom and Colonies may arise as a result of birth in Australia in exactly the same way as dual citizenship of New Zealand and the United Kingdom and Colonies as a result of birth in New Zealand,¹ the reverse position is not the same. For Australian citizenship does not descend automatically even to the first generation born outside Australia. There are the further requirements that the birth of the person concerned shall be registered at an Australian consulate, and that the father of the person concerned shall be ordinarily resident in Australia. But Australian citizenship by descent may be transmitted not only through the father but also, in the case of an illegitimate child, through the mother.² Any child born in the United Kingdom or Colonies is therefore, besides being a citizen of the country of his birth, also a citizen of Australia, if his father—or, in the case of an illegitimate child, his mother—was such a citizen ordinarily resident in Australia at the time of the birth, and if the child's birth be registered at an Australian consulate.³ As to dual citizenship of Australia and of the United Kingdom and Colonies arising after birth, whereas an Australian citizen may always acquire citizenship of the latter country by registration after twelve months' residence,⁴ such a proceeding is not productive of dual citizenship because it involves forfeiture of Australian citizenship.⁵ In the converse case, a citizen of the United Kingdom and Colonies acquiring Australian citizenship by registration is not required by the law of either country to lose his original citizenship, but he may acquire Australian citizenship only after five years' residence, and only at discretion.⁶ As to married women, whereas a woman Australian citizen who has been married to a citizen of the United Kingdom and Colonies may always acquire the citizenship of her husband as of right,⁷ in the converse situation the acquisition of Australian citizenship is discretionary and is confined to the case of a woman residing permanently in Australia with her husband.⁸

¹ See above, and see the British Nationality Act, 1948, s. 6, and the Nationality and Citizenship Act, 1948 (No. 82) (Australian Act), s. 10.

² Australian Act, s. 11.

³ British Nationality Act, 1948, s. 5; Australian Act, s. 11. Presumably registration at the office of the High Commissioner rather than at a consulate is required (cf. Australian Act, s. 5 (1)).

⁴ British Nationality Act, 1948, s. 6 (1).

⁵ Australian Act, s. 17. *Aliter* in the case of an infant registered under the British Nationality Act, 1948, s. 7.

⁶ Australian Act, s. 12 (1). An infant may be registered along with his parent or guardian (s. 12 (3)).

⁷ British Nationality Act, 1948, s. 6 (2). The continued subsistence of the marriage is immaterial.

⁸ Australian Act, s. 12 (2).

(iii) *Canada*. The law of Canada is similar to that of Australia in that there is no automatic acquisition of citizenship by any person born outside the country, that a citizen of the United Kingdom and Colonies is not entitled to citizenship by registration as of right, and that citizenship is lost on voluntary acquisition of another citizenship by a person of full age. Canada, also, in common with New Zealand and Australia, pursues a discriminatory immigration policy which in practice must diminish the incidence of plural citizenship. A child born in Canada of a father who at the time of the birth is a citizen of the United Kingdom and Colonies otherwise than by mere descent is indeed a dual citizen at birth,¹ but he loses his Canadian citizenship unless within one year of his majority he renounces his citizenship of the United Kingdom and Colonies.² In the converse case, the child of a father—or, in the case of an illegitimate child, of a mother—who is a Canadian citizen at the time of the birth is, if born within the United Kingdom and Colonies, a Canadian citizen at birth only if his birth is registered in accordance with the citizenship law.³ He loses his Canadian citizenship unless at majority he renounces his United Kingdom citizenship.⁴ A Canadian citizen of full age ceases to be such on becoming a United Kingdom citizen by registration.⁵ A United Kingdom citizen becoming a Canadian citizen after birth does not lose his original citizenship, but he may acquire the new citizenship only by the discretionary process of naturalization, a prerequisite to which is residence in Canada for five years, save in the case of the resident wife of a Canadian citizen, for whom it is one year.⁶ It would thus appear that the only person of full age who can simultaneously possess both United Kingdom and Canadian citizenship is a citizen of the United Kingdom and Colonies who has been naturalized in Canada.

(iv) *South Africa*. The possibility of the simultaneous acquisition of citizenship of the United Kingdom and Colonies and of South Africa at birth in South Africa is reduced by the circumstance that citizenship of South Africa is not capable of acquisition *jure soli* by any person whose father is a prohibited immigrant.⁷ In the converse case of birth within the United Kingdom and Colonies dual citizenship can arise only if the father of the person concerned is at the time of the birth a South African citizen in the service either of the Government of the Union or of a person or association resident or established in South Africa, or is himself ordinarily resident in South Africa. There is the further requirement that the birth

¹ British Nationality Act, 1948, s. 5; Canadian Citizenship Act, 1946 (10 Geo. VI, c. 15), as amended by 14 Geo. VI, c. 29 (Canadian Act), s. 5.

² Canadian Act, s. 16.

⁴ *Ibid.*, s. 6.

⁶ *Ibid.*, s. 10.

⁷ South African Citizenship Act, 1949 (No. 44 of 1949), s. 3.

³ *Ibid.*, s. 5.

⁵ *Ibid.*, s. 15.

shall be specially registered before South African citizenship can be acquired even in this restricted case.¹ The occurrence of dual citizenship after birth is similarly restricted by the rules that a South African citizen of full age acquiring citizenship of the United Kingdom and Colonies by registration forfeits his original citizenship,² and that a citizen of the United Kingdom and Colonies may acquire South African citizenship by registration only at discretion and only after residence for five years—or, in the case of the resident wife of a South African citizen, two years.³ South Africa's restrictive immigration policy works a further limitation in practice.

(v) *Southern Rhodesia*. Dual citizenship of Southern Rhodesia and of the United Kingdom and Colonies is acquired on birth in Southern Rhodesia of a father who is a citizen of the United Kingdom and Colonies otherwise than by descent.⁴ In the converse case of birth within the United Kingdom and Colonies dual citizenship arises if the father is a citizen of Southern Rhodesia by birth, naturalization, registration or incorporation of territory, and if the birth be specially registered.⁵ A citizen of the United Kingdom and Colonies apparently has the right to citizenship of Southern Rhodesia by registration after residence for not less than three years,⁶ but an oath of allegiance is required of him.⁷ It is expressed to be requisite that he shall further be of good character, have been assimilated with the local community, have an adequate knowledge of English, and intend to reside permanently.⁸ The relevance of these qualifications, which are the normal ones for discretionary naturalization, to what seems to be a clear right is uncertain. A woman citizen of the United Kingdom and Colonies who is the wife of a Southern Rhodesian citizen has the unmistakable right to become such a citizen herself, subject only to taking an oath of allegiance.⁹ Southern Rhodesian citizenship by registration is ordinarily lost automatically after residence elsewhere for three years.¹⁰

(vi) *Pakistan*. Plural citizenship is expressed not to be tolerated by the law of Pakistan, and a citizen of that country who possesses any other nationality or citizenship is required within one year of attaining his majority to renounce such other nationality or citizenship according to the

¹ South African Citizenship Act, 1949 (No. 44 of 1949), s. 6.

² *Ibid.*, s. 15.

³ *Ibid.*, s. 8.

⁴ British Nationality Act, 1948, s. 5, under which the case is the same if the father, being a citizen of the United Kingdom and Colonies by descent only, is in Crown service or was born in a place where the Crown exercises extraterritorial jurisdiction; Southern Rhodesian Citizenship and British Nationality Act, 1949 (No. 13 of 1949), as amended by the similarly entitled No. 49 of 1951: (Southern Rhodesian Act), s. 6.

⁵ British Nationality Act, 1948, s. 4; Southern Rhodesian Act, s. 7. Southern Rhodesian citizenship can descend only to the first generation born outside the country.

⁶ Southern Rhodesian Act, s. 19.

⁷ *Ibid.*, s. 21.

⁹ *Ibid.*, s. 25.

⁸ *Ibid.*, s. 19.

¹⁰ *Ibid.*, s. 29.

forms of the law thereof, upon pain of forfeiture of Pakistan citizenship.¹ During minority, however, dual citizenship of Pakistan and of the United Kingdom and Colonies may arise, e.g. as a result of registration of a minor citizen of the one country as a citizen of the other.² Dual status may also arise at birth, since Pakistan applies the *jus soli*³ and also confers citizenship by descent upon any person born outside Pakistan whose father is a citizen otherwise than by descent provided that in the latter case either the father is in the service of the Government at the time of the birth or the birth is specially registered.⁴

(vii) *Ceylon*. Acquisition of Ceylon citizenship is possible only by the methods of descent and registration. A person born in Ceylon is thus not a citizen unless his father is also a citizen.⁵ But a person born within the United Kingdom and Colonies whose father was at the time of his birth a citizen of Ceylon becomes such a citizen himself if his birth is specially registered.⁶ Such a person, however, loses Ceylon citizenship unless he renounces United Kingdom citizenship.⁷ A woman who has been married to a citizen of Ceylon may at discretion become such a citizen herself by registration after residence of one year, provided she intends to continue such residence.⁸ That case apart, only twenty-five persons in any one year may obtain citizenship of Ceylon by registration.⁹ In every case an oath of allegiance is required.¹⁰ And in every case failure to renounce any other citizenship possessed is a bar to acquisition of Ceylon citizenship.¹¹ In the converse case, the acquisition of the citizenship of another country by a citizen of Ceylon of full age is visited with forfeiture of Ceylon citizenship.¹² As a result, dual citizenship of Ceylon and the United Kingdom can only be possessed by a person of full age in a very exceptional case, and its incidence during minority is rare.

(viii) *India*. India has not yet legislated in parallel with the British Nationality Act, 1948, although the Indian Constitution of 1950 contains skeletal provisions as to citizenship. Under the Constitution certain classes of persons already in being at the time of its adoption are expressed to be citizens. These are, broadly speaking, persons domiciled in India who were there born, or had resided there for five years or either of whose parents were there born.¹³ There is no provision as to the future. Further legislation

¹ Pakistan Citizenship Act, 1951 (Act 11 of 1951), s. 14.

² *Ibid.*, s. 11; British Nationality Act, 1948, s. 7.

³ Pakistan Citizenship Act, 1951, s. 4.

⁴ *Ibid.*, s. 5.

⁵ (Ceylon) Citizenship Act, 1948 (No. 18), s. 5 (1).

⁶ *Ibid.*, s. 5 (2).

⁷ *Ibid.*, s. 8. Presumably the requirement can only operate when the person concerned becomes of full age.

⁸ *Ibid.*, s. 11.

⁹ *Ibid.*, s. 12.

¹⁰ *Ibid.*, s. 17 (1).

¹¹ *Ibid.*, s. 14 (2). The Citizenship Amendment Act, 1950 (No. 40) so amended the original Act (ss. 14 (3), 20 (2)) as to enable any person to be relieved temporarily of this necessity at discretion. Citizenship by registration is normally lost automatically after five years' residence outside Ceylon (Citizenship Act, 1948, s. 21).

¹² *Ibid.*, s. 19.

¹³ Indian Constitution, 1950, Articles 5-11.

is in contemplation. Pending its adoption, certain classes of persons potentially citizens of India have the transitional status of British subjects without citizenship.¹ That status cannot co-exist with citizenship of the United Kingdom and Colonies.² But the extent of overlap between Indian and United Kingdom citizenship cannot be assessed until the scheme of Indian citizenship is complete.

To the foregoing table it is perhaps useful to add a brief note on the possibility of simultaneous enjoyment of citizenship of the United Kingdom and Colonies and citizenship of Ireland, and of the former status and the statuses of a Malayan citizen and of a British protected person.

Irish citizenship is still regulated by the Irish Nationality and Citizenship Act, 1935,³ discussed in *Murray v. Parkes*.⁴ The definitive⁵ provisions of this enactment confer citizenship *jure soli*.⁶ But a person born outside Ireland is only a citizen of that country if his father was there born or naturalized, or was at the time of the birth in the service of the Government, or if the birth is specially registered.⁷ There is thus a close correspondence with the law of the United Kingdom which must produce many cases of dual citizenship at birth. But Irish citizenship acquired by registration of birth is lost by a person failing to renounce any other nationality he may possess within one year of attaining his majority.⁸ In principle, marriage has no effect on Irish citizenship.⁹ But, curiously, an Irish citizen of either sex marrying an alien and intending to reside outside the Republic of Ireland will ultimately lose Irish citizenship unless he or she executes a declaration of retention, provided, however, that he or she acquires the nationality of the alien spouse.¹⁰ Irish citizenship can be acquired after birth only by naturalization.¹¹ Foreign naturalization produces automatic loss of Irish citizenship.¹² It follows, therefore, that the principal, if not the only,¹³ case in which Irish and United Kingdom citizenship can be simultaneously enjoyed otherwise than from birth is that which arises where a United Kingdom citizen becomes naturalized in the Republic of Ireland.

¹ British Nationality Act, 1948, s. 13.

² Ibid.

³ No. 13 of 1935.

⁴ [1942] 2 K.B. 123 (see above, p. 245).

⁵ The Act also contains transitional provisions. And in fact the Irish Free State Constitution contained skeletal provisions as to citizenship. The main feature of the latter was that they contemplated the territory of the Free State to comprise the whole island of Ireland. This has led to various complications, and notably to the necessity for providing by s. 5 of the Ireland Act, 1949, for the adjustment of the effect of the British Nationality Act, 1948. See further the present writer's *British Nationality* (1951), p. 110.

⁶ Irish Nationality and Citizenship Act, 1935, s. 2 (1) (b).

⁷ Ibid., s. 2 (1) (b), (2).

⁸ Ibid., s. 2 (3).

⁹ Ibid., s. 15.

¹⁰ Ibid., s. 16.

¹¹ Cf. ss. 3-12 and 17-18.

¹² S. 21 (1). *Semble* an Irish citizen's claiming to remain a British subject under s. 2 of the British Nationality Act, 1948, does not constitute foreign naturalization for this purpose. *Sed quaere* in the case of a person born outside Ireland, who is a citizen by reason of the registration of his birth.

¹³ But, for a transitional case, see the preceding footnote.

The definitions of citizenship of the United Kingdom and Colonies and of the status of a British protected person are not mutually exclusive, since the definition of the latter status includes any person who is a citizen or national of any British-protected State or is born in, or born elsewhere of a father born in, a British protectorate.¹ For what it is worth, therefore, it may be said that a person may be simultaneously a citizen of the United Kingdom and Colonies and a British protected person. Moreover, in one particular area, namely Malaya, citizens of the United Kingdom and Colonies and British protected persons enjoy a distinct common status, namely, Malayan citizenship. That citizenship is enjoyed by subjects of the rulers of the Malay States and also by citizens of the United Kingdom and Colonies who are born in either Penang or Malacca or who are born in a Malay State and have at least one parent born in Malaya.² It may be acquired by registration by a citizen of the United Kingdom and Colonies born in Malaya of parents born elsewhere who has been resident for five years,³ or through naturalization by any other such citizen.⁴ A citizen of Malaya not already a United Kingdom citizen (i.e. a subject of a native ruler) may become a United Kingdom citizen by a simplified process of naturalization by right of his status as a British protected person.⁵ A person born in Malaya of parents born in the colony of Hong Kong may thus simultaneously be a citizen of the United Kingdom and Colonies *jure sanguinis* and a subject of the ruler of the State of his birth *jure soli*. By virtue of the former status he is also a British subject and/or a Commonwealth citizen. In virtue of the latter he is also a British protected person and a Malayan citizen. Moreover, any other citizen of the United Kingdom and Colonies may, by the process of registration or naturalization, as the case may be, acquire this sextuple status.

V. Conclusions

1. The concept of nationality developed historically as one of municipal rather than international law. Yet a precise notion of nationality is not necessary to any particular municipal system, and some systems have never developed such a notion. In particular, the law of the United Kingdom never adopted the concept of a British or United Kingdom 'national' and has been content to distinguish merely between subjects and aliens, which categories do not correspond to ideal categories of 'nationals' and 'non-nationals'.

¹ British Protectorates, Protected States and Protected Persons Order, 1949, S.I. No. 140, as amended by 1952, S.I. Nos. 457, 1417.

² Federation of Malaya Agreement (Amendment) Ordinance, 1952 (S.P. No. 19 of 1952), cl. 125. Certain other classes of citizens of the United Kingdom and Colonies are also Malayan citizens under this clause.

³ *Ibid.*, cl. 126.

⁴ *Ibid.*, cl. 129. A non-citizen British subject or an alien may become a subject of a State Ruler, and thus a Malayan citizen, by registration or naturalization: Uniform State Enactment, 1952, cls. 5-8.

⁵ British Nationality Act, 1948, s. 10.

2. Customary international law has not filled the gap arising from the circumstance that municipal law has no necessary rules as to nationality. Because of the original harmony of municipal laws in the matter, the classical system of international law developed few, if any, rules as to nationality. That system tended to assume as an extra-legal fact that municipal nationality laws did not conflict with each other. It has always been characterized by an antipathy to plural nationality—an attitude which may be expected ultimately to produce precise rules excluding that phenomenon.

3. It is not historically true that the common law has regarded plural nationality as an impossibility. Subject to such limitations as follow from the absence of any precise concept of 'nationality' as distinguished from that of the quality of being a subject, the law of the United Kingdom recognized that a person could be at one and the same time an English or British subject and a national of a foreign State even before the Naturalization Act, 1870. With the enactment of that measure recognition of plural nationality became explicit and provisions for its prevention were developed.

4. The introduction of the scheme of local citizenship of the several parts of the Commonwealth has created a distinction between citizenship of the United Kingdom and the quality of being a British subject. It is to some extent questionable whether this change has resulted in a similar distinction between plural nationality and plural citizenship. For it is not wholly clear whether a British subject, or a person treated as such, who is not also a citizen of the United Kingdom and Colonies, is a United Kingdom 'national', though it is apparent that he is not an 'alien'. It is almost inevitable that the several parts of the Commonwealth will continue to grow apart in matters of nationality law, so that the non-alienage of categories of persons other than citizens of the United Kingdom and Colonies is likely in the long run to cease to be material for the determination of the content of United Kingdom 'nationality'. At present, however, it is for practical purposes convenient to distinguish between plural nationality from the point of view of the law of the United Kingdom¹ and plural citizenship within the Commonwealth.²

¹ For a table of the possible incidence of plural nationality after 1948, see above, pp. 282-3.

² An analysis of the possible cases of such plural citizenship is given above, at pp. 285-90.

SOME OBSERVATIONS ON THE PART OF PROTEST IN INTERNATIONAL LAW

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I. Introduction

THE potentialities of the diplomatic protest, as a tool influencing the formation of international law in fields where there exists no substantial body of State practice, have not always been adequately appreciated. As unilateral and frequently opportunist instruments of State action, they may be open to the charge that the grievances which they ventilate induce a biased presentation of the legal issues in documents drafted under the pressure of events. However, in addition to providing evidence of what States consider to be the law, protests are apt to influence the development of customary rules of international law either as showing the extent of the generality of the custom in question or by assisting in the appreciation of the existence of the *opinio juris sive necessitatis* in respect of any particular practice.¹ However, it is not the purpose of this article to attempt a comprehensive survey and systematic treatment of the part which diplomatic protest plays in the international sphere. What is intended is to examine the effect of both protest and failure to protest in relation to selected topics such as the conditions of validity of protest, anticipatory protest in respect of legislation contrary to international law, the effect of the protest of a single State in the matter of subjects of general interest, and the relation of protest to the acquisition of rights by prescription.

¹ According to Hudson, the elements which must be present before a customary rule of international law can be assumed are 'the concordant and recurring action of numerous States in the domain of international relations, the conception in each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time' (*The Permanent Court of International Justice, 1920-1942* (1943), at p. 609). The requirement of acquiescence was echoed by Judge Read in his Dissenting Opinion in the *Fisheries* case (*I.C.J. Reports, 1951*, p. 202). The customary rule which Judge Read envisaged was one of limited application. In the case of *The Lotus* the Permanent Court of International Justice observed that the divergencies in State practice, to which the parties had drawn its attention, could hardly indicate the existence of the customary rule for which France contended, to the effect that in collision cases the institution of criminal proceedings was exclusively within the jurisdiction of the flag State. In support of its conclusion the Court stated that it felt called upon to 'lay stress upon the fact that it does not appear that the States concerned have objected to criminal proceedings in respect of collision cases before the courts of a country other than that the flag of which was flown, or that they have made protests. . . . This fact is directly opposed to the existence of a tacit consent on the part of States to the exclusive jurisdiction of the State whose flag is flown. . . . It seems hardly probable, and it would not be in accordance with international practice, that the French Government in the *Ortigia-Uncle-Joseph* Case, and the German Government in the *Ekkatana-West-Hinder* Case would have omitted to protest against the exercise of criminal jurisdiction by the Italian and Belgian Courts, if they had really thought that this was a violation of international law.' (*P.C.I.J.*, Series A, No. 10, p. 29.) And see Kunz in *American Journal of International Law*, 47 (1953), p. 667.

II. *Conditions of validity of protest*

Despite the fact that many protests may remain unpublished and their contents may consequently be unknown, save to their authors and recipients, there are readily available in volumes of State papers, in diplomatic correspondence, and in the proceedings of international tribunals, sufficient examples to justify some preliminary observations of a general character as to the nature and formal validity of protests. A protest has been defined as 'a formal communication from one State to another that it objects to an act performed, or contemplated, by the latter'.¹ Most writers who discuss the subject give their approval to the view, implicit in this definition, that governmental origin and an element of formality are essential to the validity of protests.²

I. *Governments as exclusive agencies of protest*

A protest may validly be formulated by any subject of international law³—though there is some controversy, perhaps unavoidable, as to what are the entities comprised in that category. What is generally agreed is that a protest, to merit treatment as a factor in the legal relations of States, must be made by, or on behalf of, a State. In so far as protests purport to reserve the rights of the protesting State, it is reasonable that they should be subject to the same conditions as are the acts upon which a State may rely as a basis for the acquisition of prescriptive or historic title, namely, that they should be acts which a State has either authorized at the time of their performance or adopted subsequently.⁴ For this reason protests which have emanated from unofficial sources and which have not been subsequently ratified by a Government, have often been rejected.⁵

¹ Oppenheim, *International Law*, vol. i (7th ed., by Lauterpacht, 1948), p. 789.

² See, for example, Strupp, *Éléments du droit international public*, vol. i (2nd ed., 1930), p. 260; Anzilotti, *Cours de droit international* (French transl. by Gidel, 1929), p. 349; Rousseau, *Principes généraux du droit international public*, vol. i (1944), p. 149.

³ See Brüel in *Acta Scandinavica Juris Gentium*, 3 (1932), pp. 81–82. Rousseau (op. cit.) summarizes the opinions of many writers when he states that a protest 'doit émaner de l'organe étatique internationalement compétent pour être prise en considération: une protestation émanée par exemple du Parlement, si elle peut avoir une grande valeur politique, reste sans valeur juridique'.

⁴ This proposition is clear as regards the acts relied upon to found title by occupation (see, for example, Oppenheim, op. cit., p. 507); it applies with equal force to the acquisition of rights by prescription.

⁵ In the course of the proceedings of the Arbitration Tribunal to which the United States and Great Britain entrusted the settlement of the *Alaskan Boundary* dispute, the difficulties attendant upon the submission of a protest, or a claim, by an individual who had not been clothed with the appropriate authority, were illustrated by the rival contentions with regard to the effect of the so-called 'Dawson letter' of February 1888. This letter, on which Great Britain relied as giving the United States notice of the claims of the Canadian Government, comprised a report of an interview between a Canadian and an American official, both members of the geological surveys of their respective Governments, in which the former had adopted certain views on the boundary question. Neither official had been empowered by his Government to make representations on the subject of the dispute. The letter was subsequently laid before Congress among other documents

2. *Formality of the act of protest*

The written protest presented through the diplomatic channel presents no difficulty in respect of the condition of formality. Indeed, it represents the normal practice of States, and it is the effect of a protest in this sense with which the present inquiry is mainly concerned. Governments are chary of placing reliance upon protests which are presented orally¹ or whose efficacy is likely to be impaired by any avoidable deficiency in form. The impermanence of the spoken word renders oral protests liable to the twin dangers of distortion and oblivion.² The importance attached by a protesting State to the rights which its protest is directed to safeguard is properly reflected in the form and substance of the communication.²

3. *Nature of the protest and the requirement of communication*

There has been no less insistence on the part of States to which protests have been addressed that their position cannot be affected by protests which are directed against mere rumours and possible future eventualities rather

pertaining to the dispute. The British allegations that the Canadian official in question represented Her Majesty's Government and that his views embodied the views of the Canadian Government, evoked from the United States Government the comment that it was assuredly 'a most remarkable procedure . . . for a Government to waive the usual channels of diplomatic communication on matters of great import, and to entrust the advancement of [such] a contention . . . to be made by an unaccredited person to a person who understood that neither of the two "had any delegated powers whatever".' (*Proceedings of the Alaskan Boundary Tribunal*, United States, Senate Documents, No. 162, 58th Congress, 2nd Session, 7 vols., 1904, vol. v, p. 183.) As Counsel for the United States pointed out: 'Governments do not act in matters of such solemn import in that sort of loose and irregular way' (*ibid.*, vol. vii, p. 900).

It may be inferred from an Opinion of the Queen's Advocate (Harding) of 11 November 1859, relative to the dispute between Great Britain and Spain concerning the right of British fishermen to land on Cuban 'Cays' and fish in adjoining waters, that a State which considers that its rights are being infringed will not be entitled to rely upon unofficial opposition to such infringements in order to safeguard its rights, but will be expected, according to the normal practice of States, to formulate an official protest. The Opinion reads, in part, as follows: 'I concur with Sir J. Dodson in considering that the Spanish title to any of these uninhabited Cays or Islets cannot be assumed as legally valid merely because it is asserted; more especially as Governor Bayley reports that "our mariners have hitherto continued to fish on these Cays, not indeed always without annoyance, but without formal warning or menace from any recognised Officer in the service of the Queen of Spain".' (F.O. 83/2371: quoted in Smith, *Great Britain and the Law of Nations* (1932), vol. ii, p. 229.)

¹ Cf. Brühl: '[La protestation] peut être formulée verbalement ou par écrit ou encore par des actes "concluants" . . .', *loc. cit.*, p. 83.

² In a dispatch of 8 December 1824, explaining the reasons for the British protest against the pretensions of the Russian Ukase of 1821 to dominion over extensive areas of the Pacific, the British Foreign Secretary, Canning, showed that he was alive to the perils of informality in such circumstances. He wrote that the Russian Decree 'could not continue longer unrepealed without compelling us to take some measure of public and effectual remonstrance against it. . . . [A] private disavowal of a published claim is no security against the revival of that claim. The suspension of the execution of a principle may be perfectly compatible with the continued maintenance of the principle itself. . . . The right of the subjects of His Majesty to navigate freely in the Pacific cannot be held as a matter of indulgence from any Power. Having once been publicly questioned, it must be publicly acknowledged . . .' (quoted in *Behring Sea Arbitration*, British Case, Cmd. 6918 (1893), p. 46).

than against specific acts and claims.¹ Many of the protests invoked by Great Britain before the Tribunal in the *Alaskan Boundary* dispute² were criticized by the United States as vague or ambiguous and described as ineffective to operate as notice of adverse claims on the ground that they were neither precise nor explicit. The main objection raised against the validity of the British protests was that they were not communicated to the Government of the United States.³ In the *Minquiers and Ecrehos* case the International Court of Justice noted that the French protest against the British Treasury Warrant of 1875, which constituted Jersey as a Port of the Channel Islands and which included the Ecrehos islets within the limits of the Port of Jersey, was based on the ground that this legislative act derogated from the terms of the Fishery Convention of 1839. It held in consequence that the protest was ineffective to 'deprive the Act of its character as a manifestation of Sovereignty'.⁴ It is both understandable and necessary that, in the matter of protests, the intention to protest should be no substitute for the deed.

¹ A protest which does not clearly indicate the act against which it is directed is without significance and may be rejected. See, for example, Note from Senor José de Carvajal to the United States representative in Madrid, dated 14 November 1873, which includes this passage: 'The protest having been presented in general terms, and without relation to any wrong [*ogravio*] inflicted on the American Union, the Government of the Spanish Republic cannot recognize your competency to make it'; and it is 'rejected with serene energy' (quoted in *Fontes Juris Gentium*, Ser. B., Sec. 1, vol. 2, Part 1, para. 513).

² See *Proceedings of the Alaskan Boundary Tribunal*, vol. v, p. 187, where one of the alleged British protests is described as 'so artfully veiled as to make it entirely undiscernible, and consequently of no significance as a notice to the Government of the United States'. And see, to the same effect, *ibid.*, p. 191, and vol. vii, pp. 903, 904.

The advice of the Queen's Advocate as to the phrasing of the projected British communication to the Spanish Government on the subject of the Cuban Cays dispute emphasized the necessity for the language of a protest to be clear and unequivocal. He urged the use of 'such decisive and peremptory language as may induce Spain if not to withdraw the claim, at least to refrain from enforcing it'. He added: 'Inasmuch as the Spanish Government persists in advancing this claim, and affects to pretend that silence gives consent to it, it is for Her Majesty's Government to consider whether its language should not be such as to obviate all doubt on the subject from henceforth . . .' (F.O. 83/2371; quoted in Smith, *op. cit.*, p. 230).

³ See *Proceedings of the Alaskan Boundary Tribunal*, vol. v, p. 198. The United States dismissed the British claim that notes which passed between the Canadian and British Governments amounted to a protest, as 'extravagant . . . unless the passage be taken to mean that the protest was simply effective as against Her Majesty's Government. . . . It certainly was no protest to the United States as it was never communicated' (*ibid.*, p. 190). As an example of studied emphasis on detail there may be mentioned the manner in which the British Minister at Caracas carried out his instructions to protest 'in unmistakable terms' against Venezuelan depredations on the liberty and property of British subjects. Enclosing a copy of his Note to the Government of Venezuela embodying the instructions to protest, he reported: 'I took this note in person to the Acting Minister for Foreign Affairs and carefully translated it to him word for word, at the same time explaining and enlarging on it in terms about which there could certainly not be any possible mistake. At the close of each sentence I asked his Excellency if he thoroughly understood it, and satisfied myself that he did so . . .' (Cmd. 1372 (1902), p. 6).

⁴ *I.C.J. Reports*, 1953, p. 66. Counsel for the United Kingdom pointed out that the first French protest 'related to the question of fisheries and did not involve any French claim to sovereignty' and was thus not an effective protest against the exercise of sovereignty by Great Britain (*Minquiers and Ecrehos* case, *Oral Pleadings*, vol. iii, p. 321).

To judge from the comparative rarity of objections to protests on grounds of form alone, it would appear that in practice States fulfil, as a matter of course and in common prudence, such requirements touching the formal validity of protests as have been indicated above to be reasonably necessary. Where a specific wrong has been done, the protesting State will normally be anxious to indicate clearly the action to which it objects and the reasons for its objection.

4. *Contents of protest*

International law prescribes no rules as to the contents of a protest. This is dictated by the purpose which the author of the protest intends to effect. It is usual, although not obligatory, for a State to indicate the reasons underlying its view that the conduct in question is contrary to international law, and for this reason a protest will often contain an exposition of the legal considerations which in the view of the protesting State are relevant.¹ Again, protests commonly indicate that the protesting State reserves its rights in respect of the conduct in question.² This practice, also, appears to be unnecessary in view of the consideration, suggested below, that the effect of a valid protest is to reserve the rights of the protesting State. The validity and effectiveness of a protest depend on the extent to which its substance accurately represents the realities, in fact and in law, of the situation which it purports to affect. It has been suggested that 'while States may give information, make representations, or "intercede" about policies which affect their interests, they may formally protest or "interpose" only when their rights are violated'.³ Although it may be possible that protests formulated on a basis other than that of a violation of the rights of the protesting State may entail legal consequences in so far as they are expressive of the conviction that the acts protested against are in the nature of an abuse of right,⁴ normally a protest is devoid of legal effect if the rights

¹ See, for example, paragraph 2 of the Note, dated 28 May 1951, from the United Kingdom to Egypt (printed in *Fisheries case, Pleadings*, vol. iv, pp. 578-9); paragraph 1 of the Notes, dated 18 July 1951, from Denmark and Sweden respectively to the Soviet Union (*ibid.*, pp. 570, 572).

² This practice is usual in protests by the United States of America. See, for example, the Notes dated 2 July 1948 from the United States to Chile and Peru respectively (*ibid.*, pp. 599-600, 602-3).

³ See Wright in *American Journal of International Law*, 32 (1938), p. 529.

⁴ See the discussion of the doctrine of abuse of rights in Lauterpacht, *The Function of Law in the International Community* (1933), pp. 286 ff. Professor Lauterpacht, discussing the frequency with which protests are made other than on a basis of right, notes: 'Accordingly, although there is little doubt that even the most absolute and exclusive rights may be exercised so that, having regard to the manner and effects of their exercise, a situation may be created amounting to the commission of an international wrong, the practice of States will frequently offer a helpful guide for the determination of the question of abuse of rights' (*ibid.*, p. 305). The protests made by a State may indicate its practice in the matter in question.

Representations have been made, which have been widely described as protests, in which the protesting State has admitted that the State to which the protest was addressed was entitled to

in defence of which it is made do not in fact pertain to the protesting State. Thus the Agent for the United Kingdom observed in the course of the oral proceedings in the *Minquiers and Ecrehos* case: 'The whole subject of protests, of course, presupposes the existence of a title on the part of the protesting country, and . . . we do not admit that France had any title. . . . For this reason alone, French protests were necessarily without legal effect.'¹ As the United Kingdom pointed out in their *Reply*,² if legal effect were to be given to protests not formulated on a basis of right the security of title of any State, however long, continuous, and peaceful the possession on which it was based, might be hazarded by the simple expedient of formulating such a protest.

5. *Purpose of protest*

- A protest constitutes a formal objection by which the protesting State makes it known that it does not recognize the legality of the acts against which the protest is directed, that it does not acquiesce in the situation which such acts have created or which they threaten to create, and that it has no intention of abandoning its own rights in the premises.—The view has been expressed that a protest 'serves the purpose of preservation of rights'—a matter for subsequent consideration—'or of making it known that the protesting State does not acquiesce in, and does not recognise, certain acts'.³ Other writers have come to similar conclusions with slight variations in emphasis.⁴ Considerations such as these are echoed in the

act in the manner which provoked the protest, but that in so doing it was acting contrary to the comity and established practice of nations. Thus, when the United States notified all foreign Governments that all ships were prohibited from bringing any liquors for beverage purposes within the ports or territorial waters of the United States, although Spain and Panama protested that the attempt to regulate matters on board foreign ships was contrary to international law, Denmark, Belgium, Great Britain, Italy, Mexico, The Netherlands, and Norway made representations in which they alleged that such acts were contrary to comity and established practice (see *Foreign Relations of the United States* (1923), vol. i, pp. 133 ff.) Similarly a spokesman for the State Department was reported as saying that six friendly nations had protested against the 'screening' provisions of the United States Immigration and Nationality Act (the McCarran-Walters Act) which was passed on 24 June 1952 and came into effect on 25 December 1952 (*The Times* newspaper, 12 December 1952, p. 6, and see *ibid.*, 11 December 1952, p. 4, 24 December 1952, p. 6, and 30 December 1952, p. 6). These protests were based on the inconvenience which enforcement of the legislation would entail.

¹ *Minquiers and Ecrehos* case, *Oral Pleadings*, vol. iii, p. 349. The French protests in relation to the Minquiers were alleged to be insufficient to interrupt the acquisition of title because their basis was a claim to fisheries, not a claim to sovereignty. The Agent for the United Kingdom gave the reason that 'you cannot in law interrupt the acquisition of title by another country unless you assert, or protest on the basis of, a claim of right yourself. You cannot in law keep territory ownerless by protesting at the exercise by another country of a sovereignty you are not prepared to assert yourself' (*ibid.*, p. 350).

² See *Reply* submitted by the United Kingdom in the *Minquiers and Ecrehos* case, para. 207.

³ Oppenheim, *op. cit.*, pp. 789–90.

⁴ G. F. de Martens states that protests are sometimes necessary 'pour empêcher que des actes qu'on prévoit ne pouvoir éviter ne soient interprétés comme faisant preuve de consentement' (*Précis du droit des gens moderne* (revised ed. of 1831), vol. i, p. 175). Fauchille (*Traité de droit international public* (8th ed., 1925), vol. i, Part 2, p. 760) and Vattel (*Le Droit des gens*, Book 2,

views expressed by Governments on the purposes of protests. Thus the reason adduced by Sir Edward Grey, the British Foreign Secretary, for the British protest of 9 December 1912 against the Panama Canal Act of that year, was that the British Government 'were unwilling to give ground for an assertion that their silence had been taken for consent'.¹

— The immediate purpose for which a protest is usually made is to procure a cessation of the conduct against which the protest is directed and, in case the protesting State has suffered loss as a result of that conduct, to obtain appropriate compensation. A protest which has led to the modification or withdrawal of the offending acts to the satisfaction of the protesting State, having thus attained its object, is of no further legal interest, beyond the possibility that both the contents of the protest and the fact of compliance with its terms may be cited in future disputes as evidence of the legal views of the States concerned in matters to which the protest related.

III. *Anticipatory protest in respect of legislation contrary to international law*

In view of the above considerations there may appear to be some doubt as to the propriety of formulating anticipatory protests, i.e. protests prior to the actual occurrence of an injury. It is clear, however, that States are under no obligation to refrain from protesting until an actual violation of their rights has taken place. Sir Arnold McNair has pointed out that protests may properly be lodged on the conclusion of a treaty calculated to lead to the infringement of rights of the protesting State.² The practice of States in the making of protests affords ample support for this view.³

ch. 11, para. 145) stress that a protest signifies the intention not to abandon a right. Strupp (op. cit., p. 260) states that protest is 'une déclaration de volonté expresse par laquelle l'État manifeste son intention de ne pas admettre comme légitime une certaine situation ou prétention'. Rousseau writes of protest: 'c'est le contraire de la reconnaissance. La protestation est une déclaration de la volonté de ne pas reconnaître comme légitime une prétention donnée, une conduite donnée, un état de choses donné...' (op. cit., p. 149).

¹ *Foreign Relations of the United States* (1912), p. 470. See also the dispatch of an earlier British Foreign Secretary, Canning, on the subject of the Russian Ukase of 1821, in the course of which he wrote: '... and when we have seen in the course of this negotiation that the Russian claim ... rests in fact on no other ground than the presumed acquiescence of the nations of Europe in the provisions of an Ukase published by the Emperor Paul in the year 1799, against which it is affirmed that no public remonstrance was made, it becomes us to be exceedingly careful that we do not, by a similar neglect on the present occasion allow a similar presumption to be raised as to an acquiescence in the Ukase of 1821' (Cmd. 6918 (1893), p. 46).

² *The Law of Treaties* (1938), p. 128: 'A State which learns that a treaty concluded between two other States has for its object or certain consequence the impairment of its rights, whether enjoyed under customary international law or under a treaty with one of the contracting parties, is entitled at once to lodge a diplomatic protest with those parties. ...'

³ Treaties which Portugal concluded in 1887 with France and Germany were the subject of a communication from Lord Salisbury to the British Minister at Lisbon, in which the latter was instructed to protest on the ground that the treaties purported to reserve to the enterprise of Portugal districts in which Great Britain took 'an exceptional interest' (quoted in Smith, op. cit., p. 8). Great Britain protested against the conclusion in 1878 by Russia and Turkey of the Treaty of St. Stephano on the ground that it was inconsistent with the Treaty of Paris of 1856 and the London Convention of 1871, to both of which instruments Russia was a party. As a consequence

This proposition holds good even at the stage where it has come to the knowledge of the protesting State that such a treaty is merely contemplated.¹ The reason for lodging protests in these situations is the practical one that the effect of so doing may be to induce the State concerned to withdraw,² renounce,³ or amend the objectionable provisions before or after the conclusion of the treaty, to withhold ratification,⁴ or to refrain from giving practical effect to such provisions,⁵ as the case may be.

Considerations of a similar nature apply to decrees, proclamations, declarations, and legislative enactments of States which, if enforced, would impair the rights of other States. No rule of international law forbids the making of protests against such legislation, and instances abound in practice where protests have been lodged against objectionable legislation when it is pending, when it has been formally enacted, and when it has been enforced.

In 1924, when anti-foreign measures were rife in Roumania, the Ameri-

the Congress of Berlin was called in 1878 when a new agreement was reached consistent with the earlier Treaties (*Harvard Draft Convention on the Law of Treaties*, printed in *American Journal of International Law*, 29 (1935), Supplement, p. 1027). For other examples of protests against the conclusion of treaties on the ground of inconsistency with earlier treaties see Lauterpacht in this *Year Book*, 13 (1936), p. 61, n. 1; and see *Harvard Draft Convention on the Law of Treaties*, loc. cit., pp. 1027 ff.

The Anglo-Congolese Agreement of 12 May 1894 was the subject of protests by the French Government, which objected to Article 2, by which Great Britain purported to lease to King Leopold a large tract of territory which she had never occupied and over which, France asserted, she had no rights of sovereignty (Cmd. 9054 (1898), pp. 15 ff.); and by Germany, who protested against Article 3, by which the Independent Congo State leased to Great Britain a strip of territory extending from Lake Tanganyika to Lake Albert Edward, on the ground that it was in violation of the Anglo-German Arrangement of 1890 (Cmd. 7390 (1894)). These instances are cited in Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926), pp. 216, 241. In the Award by the Swiss Federal Council of 22 March 1922, in the case concerning the *Colombian-Venezuelan Frontiers*, approval was given by implication to the practice of protesting against the conclusion of a treaty if the treaty was such as to threaten the rights of the protesting State. The failure of Venezuela to protest on the occasion of the conclusion of a treaty by which Colombia ceded to Brazil territory which was claimed to be Venezuelan, was a factor which weighed heavily against the Venezuelan claim (*Reports of International Arbitral Awards*, vol. i (1948), p. 223, at p. 280).

¹ See below, pp. 300-1, for a discussion of the parallel situation of protests against contemplated legislation. Similar considerations would seem to be applicable in each situation.

² The German protest against Article 3 of the Anglo-Congolese Agreement of 12 May 1894 resulted in the withdrawal of that Article. A Declaration of Withdrawal was signed on 22 June 1894 (Lindley, op. cit., p. 241. The relevant correspondence is printed in Cmd. 7390 (1894)).

³ The French protest against Article 2 of the above Agreement led to the renunciation by the Independent Congo State of all occupations and to an agreement to abstain from all political action in the greater part of the leased territory (Lindley, op. cit., p. 216. See, for the relevant correspondence, Cmd. 9054 (1898)).

⁴ The Anglo-Portuguese Treaty of 26 February 1884, in which Great Britain agreed to recognize the claim of Portugal to certain territory round the mouth of the Congo River, remained unratified as a result of the protests made by Germany and other Powers (Lindley, op. cit., p. 301; see Cmd. 4205 (1884), pp. 2, 3).

⁵ The British protest against the grant made by the Sultan of Muscat to the French Government in 1899 of a lease of a port for use as a coaling station, contrary to the terms of a Declaration in 1862 by which Great Britain and France engaged to respect the independence of the Sultan, resulted in the cancellation of the lease (Lindley, op. cit., p. 73).

can Minister there addressed a communication¹ to his Secretary of State which disclosed a situation which was not altogether unprecedented. In view of reports derived from 'the local newspapers and current rumours'² that a new law was to be passed providing for an absolute moratorium of six months against all foreign creditors who had not entered into special agreements with their Roumanian debtors, it was decided to convene a meeting of the Commercial Attachés of the United States, France, Italy, Belgium, Holland, Czechoslovakia and Switzerland to discuss the Law and to agree upon a suitable form of protest. 'At the meeting', the Minister wrote, 'it was the [general] opinion . . . that the enactment of the law in question should be anticipated by the presentation of vigorous protests from the respective legations represented.'³ In the concluding passage of this dispatch the Minister indicated the practical considerations which militated in favour of the anticipatory protest in view of the result which the lodging of such a protest is intended to secure in regard to pending legislation, namely 'its abandonment or, at least, its modification'.⁴

No doubt attaches to the right of a State to protest on the occasion of the enactment by another State of legislation which, if enforced, would impair the rights of the protesting State. Practice provides numerous examples of protests made in such circumstances against legislation in respect of a variety of matters. Thus the British Government protested⁵ against the provision in the Panama Canal Act of 1912 which exempted from charges American vessels engaged in coastal or inter-coastal trade, on the ground that such an exemption did not comply with the stipulations of the Hay-Pauncefote Treaty of 1901 to the effect that the Canal should be free and open to the vessels of all nations on terms of entire equality so that there should be no discrimination in respect of tolls or otherwise. While this legislation was still pending a preliminary protest was lodged in Washington by the British Chargé d'Affaires.⁶

¹ *Foreign Relations of the United States* (1924), vol. 2, pp. 653-6.

² *Ibid.*, p. 653.

³ *Ibid.*, p. 654.

⁴ *Ibid.*: '*En passant* it is to be noted that the opinion of my colleagues, in which I concur, is that objectionable anti-foreign laws are often prepared by a Minister in secrecy and are rushed by the Government through a docile Parliament without discussion in the almost complete absence of an articulate opposition. A legislative *fait accompli* then confronts the representatives of foreign countries against which protests are almost useless, being met with the statement from the Roumanian Government that the work of Parliament cannot be undone.' See also the reply of the United States Secretary of State to a telegram from the United States Minister in Roumania in which he was informed of a proposed Roumanian Mining Law which contained provisions prejudicial to foreign oil interests. The Secretary of State recognized the utility of the method of anticipatory protest and gave it his forthright approval (*ibid.*, pp. 597-8).

⁵ *Foreign Relations of the United States* (1912), pp. 481-9. Some sixteen years later proposals were made in Congress to extend the legislation prohibiting advance wages to seamen, to payments made by foreign vessels in foreign ports if they later entered ports in the United States. These proposals were the subject of protests by several States, including Great Britain (*ibid.* (1931), p. 811). Congress was apparently dissuaded by the Department of State from enacting the proposed legislation.

⁶ *Foreign Relations of the United States* (1912), pp. 469-71.

The attempt on the part of Russia, by publication of the Ukase of the Emperor Paul in 1821, to assert dominion over the northern waters of the Pacific and to restrict the rights of other nations therein, was made the subject of immediate and emphatic protest by Great Britain and the United States.¹ The Norwegian Decree of 1869 which defined the fishery limit off Sunnmøre as a line four miles to seaward of a long straight base-line drawn between two islets of the Norwegian Skjaergaard, met prompt protest from France.² In the course of the oral proceedings in the *Fisheries* case the Agent for the United Kingdom drew the attention of the Court to the practice normally followed by States when he observed that 'Governments do often protest against Decrees of this kind even when they are not brought to their notice through the diplomatic channel and even when they have not yet been enforced against their nationals'.³ Counsel for the United Kingdom cited several instances of protests made against legislation before its enforcement, and suggested the practical reasons underlying such action.⁴ Counsel for Norway emphasized the absence of protest on the part of the international community against the 1935 Decree and made it clear that, in his view, protests would have been expected if the circumstances had been as the United Kingdom claimed.⁵ No exception was taken to the fact that the protests lodged by the United Kingdom with various Governments responsible for the promulgation of laws which the United Kingdom Government considered to be objectionable, were based not on the seizure and condemnation of British ships, but on the mere existence of laws or decrees of delimitation made by the State in question.⁶

The passing of the Panama Canal Act by the United States in 1912 was, as has been already mentioned,⁷ the occasion for a protest on the part of the British Government. The American Ambassador in London, writing to the United States Secretary of State on 15 July 1912, reported an interview he had had with Sir Edward Grey in which the latter outlined his objection to the Act. The Ambassador quoted Sir Edward Grey as stating on behalf of the British Government that that Government 'did not wish to seem premature, but were unwilling to give ground for an assertion that their silence had been taken for consent'.⁸ Some months later the United

¹ *Behring Sea Arbitration*, British Case, Cmd. 6918 (1893), p. 58.

² *Fisheries case, Pleadings*, vol. ii, pp. 66-67.

³ *Ibid.*, vol. iv, p. 375.

⁴ *Ibid.*, pp. 396-7.

⁵ *Ibid.*, p. 234: 'Si elles avaient cru que le décret de 1935 portait atteinte à leurs droits, il est probable qu'elles seraient intervenues.'

⁶ *Ibid.*, p. 241: 'La protestation porte sur les dispositions mêmes qui ont été édictées par ces États pour délimiter leurs mers adjacentes. . . . Mais l'objet de la protestation, c'est la délimitation elle-même, et ce ne sont pas du tout des actes d'exécution qui auraient été accomplis sur la base de cette délimitation. Il n'y en a pas eu.'

⁷ Above, p. 299.

⁸ *Foreign Relations of the United States* (1912), p. 470.

Kingdom Ambassador presented the point of view of his Government on the question whether a State has the right to protest against the enactment of legislation before suffering injury as a result of the enforcement of the legislation, in a Note to the United States Secretary of State on 27 February 1913: '[His Majesty's Government] conceive that international law or usage does not support the doctrine that the passing of a statute in contravention of a treaty right affords no ground of complaint for the infraction of that right, and that the nation which holds that its treaty rights have been so infringed or brought into question by a denial that they exist, must, before protesting and seeking a means of determining the point at issue, wait until some further action violating those rights in a concrete instance has been taken. . . .'¹ This would seem to be the sound view, and the principle involved could usefully be broadened so as to embrace the protection of all rights enjoyed under international law irrespective of the source of the right in question.²

The sphere of municipal legislation in which, perhaps, the most conspicuous body of protests is encountered is that relating to the attempts of States by way of legislative enactment, decree, proclamation, or otherwise to extend, unilaterally, the area of marginal sea over which rights of sovereignty may be claimed either in all respects or in regard to one or all of various matters such as conservation of fisheries, customs control, and operations directed towards the utilization of the resources on the bed of the so-called 'continental shelf' and of its subsoil. The formal enactment of claims of this nature has in many instances met with opposition on the ground that the claims have transgressed the recognized limits and thus encroached on the jealously guarded principle of the freedom of the high seas. Legislative claims which have attracted protests have been made by Peru,³

¹ Ibid. (1913), p. 548. It is interesting to note that three years before the American refusal to admit the right of the United Kingdom to protest against the passing of the Panama Canal Act, the Department of State protested against legislation by the Government of Honduras which provided that all vessels, whether built in Honduran shipyards or built abroad, which were for the service of persons residing in Honduras, whether natives or foreigners, would be considered as Honduran vessels and as entitled, therefore, to fly only the flag of the Republic of Honduras. The Department of State pointed out that 'the decree would appear to cover vessels holding an American or other foreign registry. If so interpreted, the decree would be clearly violative of the principles of international law and in derogation of the respect due American registry' (ibid. (1909), pp. 367-8). The Law was later repealed.

² Cf. McNair, *op. cit.*, p. 128. Professor Lauterpacht has justifiably emphasized that 'a protest may be both proper and necessary for the reservation of a right' in circumstances where 'there may have taken place a legislative or administrative act in the nature of a proclamation of intention and assertion of a right, and yet, unless an actual attempt has been made to apply the law or decree in question and until an injury has actually occurred, it is probable that no judicial remedy will lie' (this *Year Book*, 27 (1950), p. 396).

³ By Presidential Decree of 1 August 1947: see *United Nations Legislative Series, Laws and Regulations on the Régime of the High Seas*, vol. i (1951), pp. 16-17. Protests were made by the United Kingdom on 6 February 1948: see the *Fisheries* case: *Pleadings*, vol. ii, pp. 747-9; and by the United States on 2 July 1948: see *United Nations Legislative Series*, loc. cit., pp. 17-18.

Chile,¹ Honduras,² Yugoslavia,³ Egypt,⁴ Ecuador,⁵ Costa Rica,⁶ El Salvador,⁷ Saudi Arabia,⁸ Argentina,⁹ and Iceland.¹⁰

The argument, frequently repeated in the written and oral Pleadings of the United Kingdom in the *Fisheries* case, that it is not by making decrees

¹ By Presidential Declaration of 23 June 1947: see *United Nations Legislative Series*, loc. cit., pp. 6-7. Protests were lodged by the United Kingdom on 6 February 1948: see *Fisheries case: Pleadings*, vol. ii, pp. 750-2; and by the United States on 2 July 1948: see *United Nations Legislative Series*, loc. cit., pp. 7-8.

² (a) In Article 153 of the Constitution of 28 March 1936: see *United Nations Legislative Series*, loc. cit., p. 80. A protest was lodged by the United Kingdom on 29 July 1936: see *Fisheries case: Pleadings*, vol. ii, pp. 743-4.

(b) By Legislative Decrees Nos. 102, 103, and 104, of 7 March 1950: see *Fisheries case: Pleadings*, vol. 4, pp. 581-3. No. 102, which amended Article 153 of the Constitution of 28 March 1936, and No. 103 are printed in *United Nations Legislative Series*, loc. cit., pp. 11-12. A protest was lodged by the United Kingdom on 23 April 1951: see *Fisheries case: Pleadings*, vol. iv, pp. 583-4.

(c) By Legislative Decree No. 25, of 17 January 1951: see *Fisheries case: Pleadings*, vol. iii, pp. 694-5. A protest was lodged by the United Kingdom on 10 September 1951: see *ibid.*, vol. iv, pp. 585-7. Mention was made of a recent protest to Honduras by the United States: see *ibid.*, p. 37.

³ By Articles 3, 5, and 8 of the Law of 1 December 1948: see *United Nations Legislative Series*, loc. cit., pp. 132-5. A protest was lodged by the United Kingdom on 5 May 1949: see *Fisheries case: Pleadings*, vol. iv, pp. 574-6.

⁴ By Decree of 18 January 1951: see *Fisheries case: Pleadings*, vol. iii, pp. 676-7. Articles 5 and 9 of the Decree are printed in *United Nations Legislative Series*, loc. cit., p. 307. A protest was lodged by the United Kingdom on 28 May 1951: see *Fisheries case: Pleadings*, vol. iv, pp. 578-80; and by the United States on 4 June 1951: see *ibid.*, p. 603.

⁵ By Congressional Decree of 21 February 1951: see *Fisheries case: Pleadings*, vol. iv, pp. 587-8; and by Articles 1 and 2 of the Presidential Decree of 22 February 1951: see *ibid.*, p. 589. A protest was lodged by the United States on 7 June 1951: see *ibid.*, pp. 603-4; and by the United Kingdom on 14 September 1951: see *ibid.*, pp. 589-90.

⁶ (a) By Decree No. 116 of the Junta of the Founders of the Second Republic, of 27 July 1948: see *Fisheries case: Pleadings*, vol. iv, pp. 591-2. A protest was lodged by the United Kingdom on 28 January 1949: see *ibid.*, pp. 592-4.

(b) By Decree No. 803 of the Junta of the Founders of the Second Republic, of 5 November 1949, which amended Decree No. 116 of 27 July 1948: see *ibid.*, vol. iv, pp. 594-5. A protest was lodged by the United Kingdom on 9 February 1950: see *ibid.*, pp. 595-6.

⁷ By Article 7 of the Political Constitution of 7 September 1950: see *Fisheries case: Pleadings*, vol. iv, p. 596; and *United Nations Legislative Series*, loc. cit., p. 300. A protest was lodged by the United Kingdom on 12 February 1950: see *Fisheries case: Pleadings*, vol. iv, pp. 596-7; and by the United States on 12 December 1950: see *ibid.*, pp. 600-1; and *United Nations Legislative Series*, loc. cit., pp. 300-1.

⁸ By Decree No. 614/53711 of 28 May 1949: see *American Journal of International Law*, 43 (1949), Supplement, pp. 154-7. Articles 5 and 9 of this Decree are printed in *United Nations Legislative Series*, loc. cit., p. 89. A protest was lodged by the United States on 19 December 1949: see *Fisheries case: Pleadings*, vol. iv, p. 601.

⁹ By Decree No. 14708 of 11 October 1946: see *United Nations Legislative Series*, loc. cit., pp. 4-5. A protest was lodged by the United States on 2 July 1948: see *ibid.*, p. 5.

¹⁰ By Law of 5 April 1948: see *United Nations Legislative Series*, loc. cit., pp. 12-13; *Fisheries case: Pleadings*, vol. iii, pp. 696-9; and by Regulations of 22 April 1950: see *ibid.* Protests were lodged by the United Kingdom on 6 July 1950: see *ibid.*, vol. iv, pp. 576-7; by Belgium on 1 September 1951: see *ibid.*, p. 401; by the Netherlands on 3 October 1951: see *ibid.*, pp. 606-7; by Germany: see *ibid.*, p. 401; and by France on 13 February 1953: see *The Times* newspaper, 14 February 1953. On 17 February 1953 *The Times* newspaper published a report confirming the fact that France had protested, and emphasizing that the protest was made only on grounds of principle, but that it was intended to reserve to France a basis for protest in the event of a decision of the Icelandic Government affecting French fishing rights in the area. The report adds: 'The dispatch of the Note will have the effect of safeguarding French interests in the event of future British-Icelandic talks on this subject producing a settlement. . . .'

that a State infringes international law, but by enforcing her decrees against foreigners, appears to suggest that what is important from the point of view of determining what is the actual practice of States, and hence what is a relevant occasion for protest, is the action taken to enforce unilateral legislative claims rather than the promulgation of the decree itself. It has been shown above that the practice of protesting against decrees before their enforcement is widespread and at the same time founded on considerations of legitimate utility. It has nowhere been suggested that a protest cannot properly be made against action taken to render effective provisions of municipal legislation which infringe rights enjoyed by the protesting State under international law. Protests against enforcement measures are common occurrences in the relations of States;¹ although the facts may have been contested, protests of this nature have in no instance been rejected on the ground that the occasion was not a proper one for protest. Confirmation of the propriety of formulating protests in these circumstances may be gained from the clear implication, which can be derived from the importance which courts have attributed to failure to protest in such a case, that a protest would have been the natural and correct reaction.²

¹ The recent protests by the Governments of Denmark and Sweden to the Government of the U.S.S.R. were made in view of the seizure by the latter Government of Danish and Swedish vessels in enforcement of the Soviet Decree of 1925 concerning the regulation of fishing, and that of 1927 concerning the protection of the national boundaries of the Soviet Union. (See the *Fisheries case, Pleadings*, vol. iv, pp. 570-4.) See also, on the Russian claims in the Baltic, the Note by Schapiro in this *Year Book*, 27 (1950), pp. 439 ff.

In 1905 a Canadian sealer, the *Agnes G. Donohoe*, was seized for violation of a Uruguayan Decree prohibiting sealing at the mouth of the Rio de la Plata, but was released after a protest had been made by Great Britain (see Fulton, *The Sovereignty of the Sea* (1911), p. 663). Gidel discusses this and other similar cases (*Le Droit international public de la mer*, vol. 3 (1934), pp. 305-6).

The seizure and condemnation of British ships by the United States, in enforcement of the Tariff Act of 1922 and the National Prohibition Act of 28 October 1919, led to British protests, especially concerning the application of the principle of constructive presence (see *Foreign Relations of the United States* (1923), vol. i, pp. 172-9).

In order to enforce the Chinese Nationalist Order of June 1949 closing ports and waters under communist control, Chinese naval vessels shelled a number of American ships. The United States protested (*Department of State Bulletin*, vol. 21 (1949), p. 945). For a summary of the facts see *ibid.*, pp. 908, 957.

² See, for example, *I.C.J. Reports*, 1951, p. 138, where the Court in the *Fisheries case* said: 'Norway has been in a position to argue without any contradiction that neither the promulgation of her delimitation Decrees in 1869 and in 1889, nor their application, gave rise to any opposition on the part of foreign States.'

The provisional Order of the Staatsgerichtshof of 10 October 1925, in the dispute between Lübeck and Mecklenburg-Schwerin concerning the exercise by the former of certain jurisdictional rights in the Bay of Lübeck, gave weight to the fact that the latter failed to protest against the Lübeck Law of 1896 in which the claim of Lübeck was unmistakably asserted, although the Law was actually put into force and applied (*Annual Digest and Reports of Public International Law Cases*, 1925-6, Case No. 85). And see Gidel, *op. cit.*, p. 663: 'Il est soumis effectivement à la juridiction tunisienne sans que celle-ci ait jamais rencontré aucune opposition de la part des Gouvernements étrangers à l'occasion des mesures prises contre les pêcheurs d'éponges de toute nationalité poursuivis pour contravention aux règlements de pêche tunisiens.'

IV. *Protest and prescription* "1. *In general*

The proof of an historic or prescriptive title in international law depends, *inter alia*, upon possession or exercise of the rights concerned which is both peaceful and continuous.¹ Evidence of intention to abandon a title would be a fatal defect so far as the requirement of continuity is concerned. That other States do not acquiesce in the situation would deprive the situation of its peaceful character. As has been pointed out,² there are two sides to the notion of peaceful and uninterrupted possession. Considerably more attention has been given in the past to assessing the evidential value of the factors adduced by States relying upon a prescriptive process for the consolidation of a title than has been paid to the nature of the measures which must be taken by States to prevent such a title maturing. It is in this latter connexion that the diplomatic protest is of special relevance. Its importance may correctly be ascribed to either of the dual functions which it has been considered apt to fulfil and each of which springs from the requirement that the acts upon which prescriptive and historic titles are based must be peaceful and uninterrupted. Those requirements must be viewed in the light of the further consideration that acquiescence is a prerequisite for the valid formation of such titles. On the one hand, it may be maintained that a protest is effectual to interrupt the running of prescriptive time inasmuch as it is equivalent to the institution of a suit in private law. With this view is linked the difficulty which besets the principle of prescription, namely, that of determining the length of the period which will suffice to consolidate the adverse possession. It is submitted that the doctrine of acquiescence is of considerable assistance in the solution of that difficulty, in that it reduces the significance of the necessity for a fixed prescriptive period by constituting a conclusive test by which the validity of a prescriptive claim may be evaluated, namely, the test of the existence or otherwise of a general conviction that the situation which has been created is in conformity with the requirements of international stability and order.

Thus it may be asserted, on the other hand, that since acquiescence is essential to the validity of a prescriptive or historic title, the relevance of protest in this connexion may be ascertained by the extent to which it

¹ See the authorities cited by Johnson in this *Year Book*, 27 (1950), pp. 343-8. See also the *Counter Memorandum* submitted by the United States in the *Island of Palmas Arbitration*, where the views of publicists on this point are summarized, at pp. 90-91. See also the *Printed Argument* submitted by Venezuela in the *Venezuela-British Guiana Boundary Arbitration*: 'To make a good title . . . adverse holding must be peaceable and not by force' (Cmd. 9501 (1899), p. 45). The former Central American Court of Justice in the *Gulf of Fonseca* case described the rights which were exercised over the disputed area as 'peaceful ownership and possession . . . that is without protest or contradiction by any nation whatsoever . . .' (*American Journal of International Law*, 11 (1917), pp. 700-1).

² See Johnson, loc. cit., pp. 345-6.

operates to rebut the presumption of acquiescence. It is suggested that this consideration underlies the opinions of those who, while affirming that States are under no obligation to protest, nevertheless maintain that a protest is necessary to preserve the rights of the protesting State in circumstances in which failure to protest would be tantamount to acquiescence.¹ To the extent that a protest serves to preserve the rights of the protesting State in such situations, it will constitute an effective bar to perfecting prescriptive and historic titles for the validity of which acquiescence forms an essential element.

2. *Protest as a bar to the acquisition of prescriptive title. Opinions of writers*

Protest is generally accepted by writers as a means of preventing the maturing of a prescriptive or historic title. It has been considered by some to serve as an indication that the protesting State does not intend to abandon its rights.² In the view of others it interrupts the continuity of the adverse claim.³ Until recently many writers have accepted it as one of the principal, if not the most important, methods of interrupting the running of prescriptive time.⁴ As late as 1934 it was possible to write with justification: 'Le moyen le plus courant, en droit international, de sauvegarder ses droits, est la protestation; on en rencontre très souvent dans la pratique...'⁵ Long before that it had been pointed out⁶ that the methods of interrupting prescription in international law differed from those utilized in private law and that, as regards the former, they were neither 'aussi faciles, aussi précis ni aussi certains', the reason being the absence of tribunals to which States might bring their claims.

¹ See, for example, Oppenheim, *op. cit.*, p. 790; Strupp, *op. cit.*, p. 260; Brûel, *loc. cit.*, p. 89. Rousseau sums the matter up thus: 'Toujours facultative, la protestation n'est juridiquement nécessaire que dans le cas où le silence équivaldrait à un assentiment tacite' (*op. cit.*, pp. 149-50).

² Vattel wrote: 'Il est bien évident aussi, que l'on ne peut opposer la Prescription au Propriétaire, qui, ne pouvant poursuivre actuellement son droit, se borne à marquer suffisamment, par quelque signe que ce soit, qu'il ne veut pas l'abandonner. C'est à quoi servent les Protestations' (*op. cit.*, Book 2, ch. 11, para. 145). See also Fauchille, *op. cit.*, vol. 1, Part 2, p. 760.

³ See, for example, Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2nd ed., revised, 1945), vol. 1, p. 387: 'Obviously a State may actively challenge the encroachments of a neighbour upon its soil, and by so interrupting the continuity of the adverse claim, prevent the perfecting of a transfer of sovereignty that might otherwise result. It is believed that diplomatic protest might suffice for that purpose, even though unsupported by the use of force.'

⁴ See Audinet in *Revue générale de droit international public*, 3 (1896), p. 322. Force of arms was considered by Fauchille to be the principal means of interrupting prescription, but he added that if a State was too weak to utilize these means 'il peut se contenter d'élever des protestations' (*op. cit.*, p. 760). Compare Gidel, *op. cit.*, p. 634: '... il est prudent pour les Gouvernements intéressés de ne pas laisser le fait préjuger le droit, de formuler leurs réserves dans un document porté sous une forme appropriée à la connaissance de l'Etat qui accomplit des actes de nature à lui permettre un jour ou l'autre de revendiquer des droits sur un espace maritime.'

⁵ Verykios, *La Prescription en droit international public* (1934), p. 99.

⁶ Audinet, *loc. cit.*

3. *The same. State practice*

In diplomatic correspondence and in pleadings before international tribunals States have utilized protests for the purposes of rebutting the presumption of acquiescence which might otherwise have been raised and to act as a bar to the perfecting of prescriptive and historic title. Counsel for the United States in the *Alaskan Boundary* dispute asserted that, had Great Britain believed her rights to be infringed or endangered, she would have protested rather than 'permit a claim of this sort to pass unchallenged, and grow into a right, or at least something by which a right can be perfected'.¹ In the course of the oral proceedings in the *Fisheries* case the Agent for the United Kingdom explained that Governments protest 'in order to make it quite clear that they have not acquiesced and to prevent a prescriptive case being built up against them'.² In the *Minquiers and Ecrehos* case Counsel for the United Kingdom observed that 'the exact legal effect of a protest depends very much on circumstances, but in general all it does is to register or record the opinion of the protesting country that the act protested against is invalid and is not acquiesced in'.³

4. *The same. Practice of international tribunals*

Similarly, international tribunals have recognized that protest is effective to prevent the acquisition of a prescriptive title. In the *Chamizal Arbitration* between the United States and Mexico the contention was advanced by the United States that it had acquired, in addition to its title under treaty provisions, a good title to the tract in dispute by prescription grounded upon possession of the territory maintained without disturbance, interruption or challenge. Only in relation to this aspect of the case was the Award of the Commissioners unanimous. They reached the conclusion that 'the possession of the United States in the present case was not of such a character as to found a prescriptive title'. They said:

'Upon the evidence adduced it is impossible to hold that the possession of El Chamizal by the United States was undisturbed, uninterrupted and unchallenged from the date of the Treaty of Guadalupe Hidalgo in 1848 until the year 1895, when, in consequence

¹ *Proceedings of the Alaskan Boundary Tribunal*, vol. 7, p. 868. The Government of Roumania expressed similar intentions in a Memorandum to Turkey of October 1876 on the question of the Danube delta: 'Elle doit néanmoins protester sans cesse pour ne pas laisser prescrire un droit, pour ne pas laisser établir l'opinion que les bouches du Danube appartiennent ou appartiendraient à la Bulgarie . . .' (*Fontes Juris Gentium*, Ser. B, Sec. 1, vol. ii, Part 1, para. 597).

² *Fisheries* case: *Pleadings*, vol. iv, pp. 375-6. The *Printed Argument* submitted by Venezuela in the *Venezuela-British Guiana Boundary Arbitration* contained this passage: 'No holding by force, against the protest of the State whose territory has been seized, will ever ripen into a title by prescription. As between individuals the bringing of an action arrests the running of the statute. There is no tribunal to which an injured State can appeal to recover the territory of which it has been deprived by force. Its maintained protest has the same effect to arrest the maturing of the title by prescription as the bringing of an action by an individual' (Cmd. 9501 (1899), p. 45).

³ *Minquiers and Ecrehos* case: *Oral Pleadings*, vol. i, p. 155.

of the creation of a competent tribunal to decide the question, the Chamizal case was first presented. On the contrary it may be said that the physical possession taken by citizens of the United States and the political control exercised by the local and federal governments, have been constantly challenged and questioned by the Republic of Mexico, through its accredited diplomatic agents.¹

The Commissioners added:

'In private law, the interruption of prescription is effected by a suit, but in dealings between nations this is of course impossible, unless and until an international tribunal is established for such purpose. In the present case the Mexican claim was asserted before the International Boundary Commission within a reasonable time after it commenced to exercise its functions, and prior to that date the Mexican Government had done all that could be reasonably required of it by way of protest against the alleged encroachment.'²

5. *Protest as a subsidiary to other means of safeguarding rights*

It may be useful, before discussing the extent to which protest constitutes a bar to the acquisition of prescriptive or historic title at the present time, to ascertain whether, and if so to what extent, the presentation of a protest effected this end in the past. It might be concluded from the foregoing pages that protest pure and simple was apt to interrupt the running of prescriptive time; and it was suggested as recently as 1945 that a diplomatic protest might suffice for that purpose.³ There are, however, indications, both in the Award of the Commissioners in the *Chamizal Arbitration*⁴ and in the proceedings of the *Venezuela-British Guiana Boundary Arbitration*, that protest was considered, of itself, inadequate for the purpose of interrupting prescription.⁵ It is suggested that protest alone suffices to prevent the acquisition of a prescriptive or historic title only in those cases in which the protesting State is able to convince the Tribunal to which the

¹ Award of 15 June 1911, in the *Chamizal Arbitration* (*American Journal of International Law*, 5 (1911), p. 806).

² *Ibid.*, p. 807.

³ See Hyde, *op. cit.*, vol. 1, p. 387. Audinet, after ascribing to protest the power to interrupt prescription, suggested that protest might not always be possible and that a weak State might remain silent and allow the prescriptive period to run against it 'parce qu'il ne sera pas à même de soutenir, au besoin, ses réclamations par les armes' (*loc. cit.* 3 (1896), p. 322).

⁴ The Commissioners may have intended protest to bear a somewhat wider connotation than that of a formal diplomatic protest. They found that Mexico 'had done all that could reasonably be required of it by way of protest against the alleged encroachment' and added that it was quite clear 'that however much the Mexicans may have desired to take physical possession of the district, the result of any attempt to do so would have provoked scenes of violence and the Republic of Mexico can not be blamed for resorting to the milder forms of protest contained in its diplomatic correspondence' (see *American Journal of International Law*, 5 (1911), p. 807).

⁵ Venezuela argued that the 'maintained protest' of a State is effective to interrupt the development of a prescriptive title (see *Printed Argument* submitted by Venezuela: Cmd. 9501 (1899), p. 45). An earlier passage indicates that maintained protest signified more than the mere regular repetition of protests, however unequivocal their terms. The passage reads: 'Venezuela's claims and her protests against alleged British usurpation have been constant and emphatic, and have been enforced by all the means practicable for a weak power to employ in its dealings with a strong one, even to the rupture of diplomatic relations' (*ibid.*, p. 29).

question is later referred that the circumstances were such that a protest constituted the only feasible method of asserting its rights. Tribunals appear, in the past, to have required proof that the protesting State had taken some further steps as evidence of the seriousness and good faith of its intention to oppose encroachments on its rights. Into such a category might fall acts such as the severance of diplomatic relations and measures of retorsion.

It is relevant to point out in this connexion that two developments must be considered to have affected the potential value of the diplomatic protest at the present time. The first is the extent to which the General Treaty for the Renunciation of War, in conjunction with the provisions of Article 2 (4) of the Charter of the United Nations, have imposed a wide prohibition of the threat or use of force in international relations. As a result courts must now be precluded from requiring, as additional measures of self-help, that protests should be supported by force or a show of force. The second development consists in the appearance on the international scene of institutions to which resort can be had to prevent the formation of prescriptive titles. Since the establishment of the Permanent Court of Arbitration, the League of Nations and the Permanent Court of International Justice, and, later, of the United Nations and the International Court of Justice, it may be argued that there exists the necessary machinery to allow the methods for interrupting prescription to be regularized and assimilated to those in force in municipal systems of law—a consummation which the Commissioners in the *Chamizal Arbitration* hoped would be achieved in the course of time.

6. *Requirement of repetition of protest*

In the event of repetition of the acts protested against or the continuation of the situation created by them, it is clear that scant regard will be paid to the isolated protest of a State which takes no further action to combat continued infringements of its rights.¹ Failure to supplement the initial expression of disapproval will not unreasonably give rise to the presumption either that its opposition could not be supported by any show of legal right, or that, even if able to protest on the basis of a claim of right, it was for some reason indifferent to the outcome. Two illustrations are furnished by the *Fisheries* case. Counsel for Norway maintained that it was impossible to attribute any probative value to the oral protest of the German Govern-

¹ The opinion may be not unjustified that a protest constitutes no more than the minimum expenditure of effort compatible with an intention to preserve rights. However, it is arguable that increased weight will be attached to the cumulative effect of protests which have been persistently reiterated. This view is impliedly acknowledged by Hyde, who considered that a State should forfeit its rights 'at least when it has failed to make constant and appropriate effort to keep them alive, as by ceaseless protests against the acts of the wrongdoer' (op. cit., vol. 1, p. 387). And see Lauterpacht in *Hague Recueil*, 62 (1937), p. 291.

ment against the Decree of 1935 for the reason that the protest was not followed by any further action and that the subsequent attitude of the German Government deprived its initial protest of all significance.¹ At an earlier stage in the history of the Norwegian claims the French Chargé d'Affaires in Stockholm addressed a series of Notes, the last of which was dated 27 July 1870, to the Foreign Minister of Norway and Sweden, in which the French Government disassociated itself from any recognition of the principles contained in the Norwegian Decree of 1869. The British Government maintained with some justification that the terms of these Notes constituted an objection to the Norwegian claims on the part of France.² This was the point of view maintained by the Note of 27 July 1870, although the limits claimed were admittedly accepted, but only as a special case. France offered to recognize the limits laid down in the Decree, leaving aside any question of law. No answer to this offer was received and the matter was allowed to drop. France did not prosecute her objection further. This incident did not convince the Court that France was opposed to the principles contained in the Decree and it concluded that the Norwegian system of delimitation had 'encountered no opposition on the part of other States'.³

It has been affirmed that, in principle, a diplomatic protest can of itself effectively interrupt the running of prescription, with the qualification that, unless they are followed by contestation and settlement of the question, protests lose their force.⁴ The efficacy of protests admits of certain limitations once consideration is given to the situation resulting from repetition of the usage protested against or to the effect of the continuation of the situation which provoked the initial protest. It is generally conceded that a protest acts to some extent as a bar to the perfecting of a prescriptive or historic title, and therefore serves to that extent to preserve the rights of the protesting State.⁵ What is in doubt is the period during which the effectiveness of a protest persists. The matter is without complications where subsequent recognition of the claim or situation is express,⁶ but it is less straightforward where acquiescence is to be inferred from the surrounding circumstances, and this has to be done in most cases where prescriptive or historic claims are disputed. It is not suggested that a protest must be

¹ See *Fisheries case: Pleadings*, vol. iv, p. 234: 'Mais cette communication est restée sans effet et elle n'a été suivie d'aucune autre démarche. Après avoir fait ce geste, le Gouvernement allemand s'est abstenu d'en tirer la moindre conséquence.'

² See, for example, the statement by the Attorney-General (Sir Frank Soskice) in the *Fisheries case: Pleadings*, vol. iv, pp. 138-9.

³ *I.C.J. Reports*, 1951, p. 137.

⁴ See Verykios, *op. cit.*, p. 86.

⁵ See Verykios, *op. cit.*; Brûel, *loc. cit.*, pp. 90-91. See also the *Fisheries case: Pleadings*, vol. ii, p. 654.

⁶ See, for example, Anzilotti, *op. cit.*, p. 349: 'Les effets de la protestation cessent si l'Etat reconnaît les prétentions ou les faits contre lesquels il avait protesté.'

productive of factual results before it can have the effect of preventing the acquisition of title by prescription.¹

7. Requirement of action other than protest

The current view is that, having regard to the availability, since 1919, of some international machinery before which complaints can be lodged, a protest amounts to no more than a 'a temporary bar'.² Such is in effect the view adopted by the Government of the United Kingdom, which maintained that a protest is 'by itself effective to manifest the objection of the protesting State and for a certain period reserve its rights'³ and that 'it is only true to say that the protest of a single State will not prevent an exceptional usage from becoming lawful by prescription *indefinitely*'.⁴

Tribunals which are seized of questions relating to the extent of the period after which protests cease to be of value and become academic, may be guided to some extent by principles which have been developed mainly in the course of proceedings before the International Court of Justice. The view that protests lost their force unless they were followed by further acts contesting the claim was substantially adopted by the United Kingdom as an accurate representation of the existing law. Mere repetition of the protest was not enough to guarantee its effectiveness. Although due weight must be given to intrinsic factors such as the special interests of the State in relation to the nature of the opposing claims and to its geographical propinquity to the area concerned, such factors could not be considered as decisive of the importance to be attached to the protest.⁵ Of more importance, in the view of the United Kingdom Government, is 'the *nature* of the protest and the action taken by the protesting State to safeguard the right which it conceives to have been infringed. . . . The protest of a single State

¹ Sørensen, in *Acta Scandinavica Juris Gentium*, 3 (1932), p. 159, writes: 'Une protestation qui, par ailleurs, reste sans résultats, n'a dès lors pour effet que de retarder le moment de l'acquisition définitive par la prescription.' Brüel (loc. cit., p. 88) advanced the somewhat unexpected view that it would be unwise to insist on a protest being effectual because such a requirement would run counter to the desirable trend of abandoning private in favour of public enforcement and preservation of rights.

² See Johnson in this *Year Book*, 27 (1950), p. 346.

³ *Fisheries case: Pleadings*, vol. ii, p. 652.

⁴ *Ibid.*, p. 654. The United Kingdom appears to have admitted the possibility that in some circumstances mere protests might be of more definite effect. It was suggested in the *Minquiers and Ecrehos* case that 'the character of the action taken by the protesting State must be related to that being taken by the State acquiring title, and the two must be considered together. Minor manifestations in the purported exercise of title might well be adequately met by protests.' This was not applicable with regard to acts of such a character as to create a situation of urgency (*Oral Pleadings*, vol. iii, p. 351).

⁵ See *Fisheries case: Pleadings*, op. cit., vol. ii, p. 653. And see Gidel: 'Une seule contestation émanant d'un seul Etat ne saurait infirmer un usage; les contestations ne peuvent d'autre part être placées toutes sur le même plan, sans distinction de leur nature, de la situation géographique ou autre de l'Etat dont elles émanent.' (Op. cit., p. 634.) Gidel adds that each must be considered in relation to the circumstances of the particular case against the background of the guiding principle expressed in the maxim *quieta non movere*.

... is effective to prevent the establishment of a prescriptive title precisely to the extent that the State takes all necessary and reasonable steps to prosecute the available means of redressing the infringement of its rights.¹ The *Reply* then proceeded to elaborate the additional measures which must be taken to make the protest effective. Not surprisingly, the suggested measures follow closely the lines of action pursued by the United Kingdom during the course of the dispute with Norway. They comprised the active prosecution of the objection through diplomatic negotiations, the arrangement of a *modus vivendi* and, ultimately, the reference of the dispute, or the willingness to refer it, to an international tribunal for adjudication. The attention of the Court was drawn to the fact that the United Kingdom had taken all the available steps necessary to permit the protest of a single State to invalidate a usage.²

That the requirement of further steps of this nature was not a point of view adopted solely for the occasion of the *Fisheries* case is indicated by evidence of the expression of similar views in other circumstances. The reactions of the United Kingdom to the incidents which gave rise to the *Corfu Channel* case are described in the *Reply of the United Kingdom* in that case as follows: '... the British forces refrained from the use of any force and the incident was followed up in a peaceful manner in the first case by diplomatic protests and in the second case ... by recourse to the Security Council of the United Nations'.³ On 23 March 1949 the Under-Secretary of State for Foreign Affairs, in reply to the question of a member of the House of Commons arising out of the establishment by nationals of Argentina and Chile of posts on British territory in the Falkland Islands Dependencies 'in defiance of our protests', referred to the British offer to bring the dispute before the International Court of Justice, and to the fact that this offer had been refused. He added: 'I do not agree that the Government's attitude has been weak. I think we have shown a good example of restraint in this matter and of going through the proper forms of international collaboration.'⁴

The proceedings in the *Minquiers and Ecrehos* case tend to endorse the view that protests may not of themselves be sufficient to prevent the acquisition of title by prescription and that courts will require evidence of the assumption by the protesting State of some positive initiative towards settlement of the dispute in the form of an attempt to utilize all available and appropriate international machinery for that purpose. Whereas the

¹ *Pleadings*, vol. ii, pp. 653-4.

² See, for example, *ibid.*, vol. ii, pp. 656, 678. In the event, it proved to be unnecessary for the Court to consider this argument in its Judgment, as it came to the conclusion that the United Kingdom had acquiesced in the Norwegian system of delimitation and therefore its subsequent opposition was out of time.

³ International Court of Justice, the *Corfu Channel* case (1950): *Pleadings*, vol. ii, p. 277.

⁴ *Hansard, House of Commons Debates* (5th series), vol. 463, No. 86, col. 343.

United Kingdom contended that protests produced no legal effects unless followed by other action, such as reference of the dispute—or a proposal to refer it—to an appropriate international organization or tribunal,¹ the French submission, based upon the Award in the *Chamizal Arbitration*,² was that since resort to force or the severance of diplomatic relations might have strained to breaking-point the relations between the two States, 'paper' protests sufficed to prevent the acquisition of title.³ Judge Carneiro in his Individual Opinion commented upon the French submission in words which explicitly approved the main British contention. After praising the moderation displayed by France he made the following observations: 'Could [France] not have done anything else? It could have, and it ought to have, unless I am mistaken, proposed arbitration; all the more so since the two States were bound by the Treaty of October 14th, 1903, which provided for the settlement by the Permanent Court of Arbitration of all legal disputes or disputes involving the interpretation of a treaty.'⁴ Pointing out that the Award in the *Chamizal Arbitration* of 1911 related to the period between 1848 and 1895 when there was no international tribunal, he remarked that such a tribunal had now been in existence for many years, and added: 'Why did France not at least propose that the dispute should be referred to this tribunal as England has done, after more than half a century of intermittent and fruitless discussion? The failure to make such a proposal deprives the claim of much of its force; it may even render it obsolete.'⁵

8. *Cases of sufficiency of protest*

It may be true, as has been asserted, that one result of the advent and development of machinery for the settlement of international disputes has been to reduce the significance of the diplomatic protest in the field of acquisitive prescription.⁶ However, the scope of the possible exceptions to the statement that protest is not now the principal mode of interrupting prescription remains wide enough to merit further consideration. There still exist circumstances in which what has been described as 'the somewhat crude and ineffective method of the diplomatic protest'⁷ may be of decisive

¹ See *Reply* submitted by the United Kingdom in the *Minquiers and Ecrehos* case, para. 230; and see the *Oral Pleadings*, vol. iii, pp. 350, 352.

³ *Minquiers and Ecrehos* case: *Oral Pleadings*, vol. iii, p. 384.

² See above, pp. 308-9.

⁴ *I.C.J. Reports*, 1953, p. 107: and see *Reply* submitted by the United Kingdom in the *Minquiers and Ecrehos* case, para. 230: 'The United Kingdom Government submit that, under international law, diplomatic protests may act as a temporary bar to the acquisition of title, but that they do not act as a complete bar unless, within a reasonable time, they are followed up by reference of the dispute to the appropriate international organization or international tribunal—where such a course is possible—or, at the least, by proposals to that effect, which the other party rejects or fails to take up.'

⁵ *I.C.J. Reports*, 1953, p. 108. And see Johnson, *loc. cit.*, p. 342.

⁶ See *ibid.*, p. 346.

⁷ See *ibid.*, p. 341.

importance. It has been pointed out¹ that where there is no binding obligation upon States to submit disputes to the determination of international tribunals, a wronged State may have no recourse other than protest. If this is true in the event of wrongs which are clearly actionable, it is true also of wrongs merely anticipated as a result of published claims. A similar difficulty arises in cases where redress might be sought by application to a political agency. If the subject-matter of a dispute is not of sufficient importance or is for any other reason excluded from the category of disputes with which that agency has been constitutionally empowered to deal, a wronged State is, in this case also, restricted to making protests in an effort to safeguard its rights. Considerations such as these 'enhance the importance . . . both of protest and of the failure to protest'.²

Mention has already been made³ of the frequency with which States have asserted exceptional claims by means of municipal legislation. It has been suggested that when a claim is made in this way without actually being enforced by the State in question—e.g. when a State has claimed a belt of territorial waters of a width far in excess of that considered to be in accordance with international law by the majority of States, but has taken no positive steps to enforce its claim by the arrest of foreign vessels found fishing within the forbidden limits—the proper and probably the only effective course open to an aggrieved State is to protest formally through the diplomatic channel. Having suffered no actual infringement of its rights, it is unlikely that an aggrieved State has any substantial cause of action before an international tribunal.⁴ It is submitted that in such cases a protest which was promptly presented and subsequently maintained would suffice to reserve the rights of the protesting State, at least until the attempt is made to enforce the legislation. In view of the necessity of

¹ See Lauterpacht in this *Year Book*, 27 (1950), pp. 396–7.

² *Ibid.*, p. 397.

³ See above, pp. 303–4.

⁴ Cf. McNair, *The Law of Treaties* (1938), p. 128, in which it is stated that where a treaty is concluded which has 'for its object or certain consequence' the infringement of the rights of a State, that State is entitled to protest 'and to apply to the Permanent Court of International Justice, or to any other tribunal to which the disputants may have agreed to refer their disputes, for a declaration and for interlocutory relief. It is unnecessary to wait until the apprehended injury occurs.' Again this raises the question of compulsory jurisdiction of the tribunal to which application is made for relief. To seek a remedy by way of injunction to restrain the alleged wrongdoer from enforcing its legislative claims before an actual wrong has been committed would not appear to be a feasible procedure in the present stage of development of international law. If it were, in fact, possible to proceed by way of applying for a declaratory judgment in the face of anticipated infringements of rights, or at least of infringements of a nature which, if permitted to take place, would do irreparable harm, much of the value of recording a protest would disappear if the protesting State failed to apply for at least interim measures of protection. Diplomatic protest would remain an effective method of reserving rights in circumstances where the tribunal could not assume jurisdiction; and a protest might, as has been suggested above, lead to the withdrawal of the objectionable legislation. It may be noted that the acts involved in disputed claims to prescriptive and historic rights are not usually of such a character that their continuance would prejudice irreparably the eventual rights of the parties, and the basis of a successful application for measures of interim protection would therefore be lacking.

proving some actual exercise of sovereignty, in the case of a prescriptive title, or actual and exclusive enjoyment of the right concerned, in the case of historic title, these could hardly be perfected on the basis of mere legislative claims unsupported by evidence of enforcement.¹ This is presumably the kind of situation envisaged by the Agent for the United Kingdom in the course of the oral proceedings in the *Minquiers and Ecrehos* case when he suggested that the type of action taken by the protesting State must be related to the type of acts against which the opposition is directed, and that on occasions mere protests might suffice to nullify claims of a minor character.² During the oral hearings in the *Fisheries* case the Agent for the United Kingdom gave expression to a similar train of thought in these words: 'The decree made by a State is only one aspect of the matter. The other and equally important aspect is the attitude of other States towards the decree and in particular . . . to its enforcement against their nationals or vessels. . . . The paper protest is at least as important as the paper decree.'³

Similar considerations are relevant in the case of a situation which is of recent origin. In the absence of the consolidating factor of the passage of time, protest alone may be adequate to protect the rights of the protesting State.⁴ The question of prescriptive or historic claims does not arise in this case, and the doctrine of acquiescence is inapplicable. In its *Reply* in the *Fisheries* case the United Kingdom Government assented in general to the proposition that a single protest of one State did not invalidate a claim of right, 'so long as it is kept in mind that it relates strictly to the acquisition of title not by mere usage but by *prescriptive* usage'.⁵ Although the full import of this qualification is not readily apparent, the implication may be that where the question is one of acquisition of rights by a process akin to the formation of customary rules, in which, in theory at least, the passage of time plays no essential part, the single protest of a single State would suffice, at any rate so far as the protesting State is concerned. If the invalidation is intended to extend to the usage as a whole in relation to all

¹ The Agent for the United Kingdom pointed out in the *Fisheries* case that 'it takes a long time before a prescriptive case can be built up on the basis of mere silence when there has been no enforcement of the Decree against the nationals of the State in question' (*Pleadings*, vol. iv, p. 346).

² See *Minquiers and Ecrehos* case: *Oral Pleadings*, vol. iii, p. 351.

³ *Fisheries* case: *Pleadings*, vol. iv, p. 37; and see *ibid.*, p. 37: 'For the Court, as evidence of the practice of States the Swedish and Danish protests [against the enforcement of a Soviet Decree claiming a 12-mile belt of territorial waters] are every bit as valuable evidence as the text of the Soviet decree.'

⁴ See, for example, the *Fisheries* case: *Pleadings*, vol. iv, p. 308: 'Nous sommes également d'accord avec le Gouvernement britannique pour admettre que, si une prétention nouvelle est formulée par un Etat, cette prétention n'est pas opposable à un autre Etat qui, dès le début et d'une manière non équivoque, y aurait fait opposition. Une opposition, même isolée, suffirait en pareil cas, pour préserver les droits de l'opposant, parce qu'il s'agit d'une prétention nouvelle et sur laquelle, par conséquent, l'action du temps n'a pas encore pu produire ses effets.'

⁵ *Ibid.*, vol. ii, p. 652.

States affected by it, the proposition could only be tenable in respect of the protest of a State whose influence or interest in the sphere of activity to which the question related is paramount.¹

V. *Relevance of protest of a single State*

In connexion with the preceding observations reference may be made to the question of the effect of protest of a single State on the formation of historic title. Throughout the pleadings in the *Fisheries* case there appears to have persisted a disagreement between the parties as to the weight to be attached to the protest of a single State. The United Kingdom and Norway were at one in conceding that a State with established rights did not lose them by virtue of an essential change in the content of the customary law provided that it had persistently protested in an unambiguous manner from the first signs of change known to it.² The difficulties derive from the difference of approach of either side to the question of historic title in general. The United Kingdom maintained that an historic title was in the nature of an exception and derogated from the customary rules of international law, whereas Norway based her historic title on the enjoyment of rights which existed prior to the development of the customary rules in question. This to some extent explains why the United Kingdom stressed the necessity for a consensual basis for exceptions to the customary rules and why Norway denied that the assent of other States was essential. While admitting the efficacy of protest to preserve existing rights against customary rules developed subsequently, she was yet able to deny effect to the protests of a State against the exercise of historic rights, at least when the remainder of the international community had apparently acquiesced.

When a mere usage against which a State has protested is one which, if permitted to develop into a right based on custom, would derogate from rights vested in other States in common, the attitude of the other States concerned is a relevant factor in assessing the value of the protest of a single State. If the other States have acquiesced in the repetition of the practice complained of to such an extent that the conviction is generally prevalent that that practice has become part of the established legal order, then a single State which has repeatedly protested, if it has limited its objections to the making of protests and has failed to utilize other available machinery, will have lost those rights which its protests were intended to preserve. *A fortiori* it will lose those rights if its objection is limited to a single initial

¹ The suggestion has been made that in the formation of a customary rule less importance should be attached to the number of States participating in its evolution and to the period within which the transformation takes place than to the relative importance, in the matter in question, of the States inaugurating the change. See Lauterpacht in this *Year Book*, 27 (1950), p. 394.

² See, for example, the speech of the Attorney-General (Sir Frank Soskice): *Pleadings*, vol. iv, p. 136.

protest. The United Kingdom Government adopted this line of argument in the *Fisheries* case.¹ However, they urged that the principle by which the rights of the protesting State became barred by lapse of time was based either on a presumption of tacit acquiescence flowing from continued relative inaction or on the maxim *quieta non movere*. The 'temporary bar' which is constituted by protest extends, in these circumstances, only to the period, long or relatively short, during which the bulk of the international community remains uncommitted to the view that the usage complained of is in conformity with the law. Once the stage has been reached at which the usage has assumed the complexion of legality generally recognized, further diplomatic protests on the part of the objecting State are without effect.

It is far from clear, however, that a State which has from the outset protested vigorously and unambiguously and which has supplemented its repeated protests by utilizing every other means available to it, all without result, should be deemed to have forfeited its rights merely because of the inactivity of other States. There is little justification for allowing a presumption of acquiescence flowing from continued inaction to prevail in the face of facts to the contrary. To apply the maxim *quieta non movere* indiscriminately to such circumstances might be equally productive of injustice. It may be admitted, as the Norwegian *Reply* maintains, that 'une opposition isolée n'est point capable d'empêcher la formation du titre historique; et qu'il convient de ne pas oublier, quand on doit statuer en pareille matière, le sage conseil que contient la maxime *quieta non movere*'.² What is controversial is whether such a title is valid *erga omnes*, as Norway contended, or whether it is valid only as against those States which have either expressly assented or acquiesced. In other words, do the repeated protests of a State which alone has from the first unambiguously and persistently manifested its objection to a novel practice and which has sought to resolve the dispute by all available means, have the effect of rendering that practice invalid in relation to the protesting State and incapable of becoming a source of obligations to which the protesting State is bound to submit as a matter of law? It is submitted that reasons of both justice and logic militate in favour of the view that a State, even although it is the only member of the international community to adopt such a position, which has thus clearly demonstrated its opposition to the change, does not by virtue of the acceptance of the change by other States, forfeit its rights. This was certainly the view of the United Kingdom Government. It was clearly

¹ See *Pleadings*, vol. ii, p. 654: 'But, if the usage which is protested against is repeated and is acquiesced in by other States, then the question may ultimately be asked why the protesting State, if it attaches importance to its rights, has not taken further steps to bring the matter to contestation and settlement. In other words, a State which contents itself with paper protests and does not use the available means of pressing its objections may after a certain lapse of time be debarred from further questioning what has become part of the established legal order.'

² See *ibid.*, vol. iii, p. 462.

expressed by the Attorney-General, and may be considered as a logical extension of the Norwegian view,¹ that the single protest of a single State sufficed to preserve the rights of the protesting State when the claim or situation was of a novel character. The Attorney-General was emphatic in his insistence on the efficacy of the diplomatic protest supported by appropriate attempts to reach a settlement. He was in agreement with the argument advanced by Norway that a State with established rights does not lose its rights by virtue of a change in the customary law provided that it has unambiguously and persistently manifested its dissent therefrom. 'How then', he continued, 'can a State, which has established rights under customary law to regard certain areas of sea as high seas and which unambiguously and persistently protests against a claim purporting to alter its rights, lose its rights merely because other States do not immediately take similar action?'² Such a contention would imply that 'if only one State protests, a new claim becomes established as against all other States, including the protesting State. The new claim is apparently to be enforceable against all States regardless of whether the protesting State has had a reasonable opportunity to prosecute its objection by diplomatic and legal action and regardless of whether a sufficient time has elapsed to make it reasonable to imply the assent of other States.'³ This view the Government of the United Kingdom declined to accept.

If there is some justification for attributing to the diplomatic protest, properly supplemented, the power to prevent the formation of an historic title, there is all the more reason to suppose that it is apt—provided, again, that it is properly supplemented—to interrupt the running of prescription. The attitude of other States is not a directly relevant consideration. The decisive consideration is whether the exercise by the claimant State of the adverse right, or the enjoyment of the adverse possession, has been peaceful and uninterrupted. It is submitted that a protest, if it is prompt, unequivocal and maintained, and if it is coupled with recourse by the protesting State to all other legitimate demonstrations of its will to preserve its rights, will suffice to counter effectively the continuity and the peaceful character of a nascent prescriptive claim and will prevent the creation of any general conviction that the condition of affairs is in conformity with international order. It would be unreasonable to draw the same disabling consequences from the conduct of a State which has acted energetically in defence of its rights, by protesting and taking other appropriate action, as would follow the inaction of a State which was either indifferent to losing its rights or negligent in asserting them.

¹ See *Pleadings*, vol. iv, p. 308.

² See *ibid.*, p. 136.

³ *Ibid.*, pp. 135-6.

THE COMMONWEALTH AND INTERNATIONAL LAW

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THERE used to be, and perhaps there still is, a doctrine of the British Commonwealth called the *inter se* doctrine, which asserts that relations between the countries of the Commonwealth are not international relations but *sui generis*, being founded upon a common allegiance to the Crown; that in so far as these relations are governed by law it is Commonwealth constitutional law, and that international law is to a more or less extent inappropriate and perhaps even inapplicable. This assertion that there is in the Commonwealth a *tertium quid* between municipal law and international law is obviously one of great interest and importance to international lawyers. The question is well stated in this passage from the late R. T. E. Latham's essay on the Law and the Commonwealth:¹

'The question therefore arises whether the conventions, understandings, and obligations of the Commonwealth form likewise in any degree a coherent system, or merely a congeries of rules connected only by a certain similarity of subject-matter. If they should be found to constitute a coherent system, the further question will arise, what is the relation of that system to municipal law on the one hand and international on the other; and the possibility must not be excluded that Commonwealth conventions may prove to be indistinguishable from rules of municipal or of international law.'

This question has been canvassed thoroughly by many writers,² but all the expositions of the subject belong to the period between the two World Wars. It seems to be an appropriate moment to attempt, from the point of view of the international lawyer, a re-examination of the question in the light of the great changes in the Commonwealth since the end of the Second World War.

Whatever may have been the doctrinal position, there has been no period when the *inter se* formula has been applied consistently in practice; its incidence has always varied very much from one subject-matter to another. That being so, any investigation of the subject must proceed by way of an examination seriatim of those several aspects of the inter-Commonwealth relationship where the doctrine has manifested itself in one form or another. It will be convenient to consider first those matters, such as sovereign im-

¹ Printed as a supplementary Chapter to *Survey of British Commonwealth Affairs*, vol. i, *Problems of Nationality*, by Hancock (1937).

² See especially Noel-Baker, *The Present Juridical Status of the British Dominions in International Law* (1929). (The writer unfortunately has not had the advantage of reading the new edition by Noel-Baker and Fawcett which, it is understood, will be published shortly.) Also the works of the late Professor Keith *passim*.

munities, extradition, and the like, where the *inter se* rule is either the same as the international rule or so closely analogous to it as to cast doubt on the validity and usefulness of the distinction; secondly, some matters, such as disputes and treaties, where the *inter se* doctrine has tended to be the dominant influence, and where in some periods the international rule has been ousted altogether. It is not without significance that the first group of matters are related mainly to questions of status, whilst the second are related mainly to questions of co-operation. Thirdly, we shall consider the question of nationality, which bridges both these groups, and by its importance and complexity demands separate treatment.

I. *Diplomatic and other jurisdictional immunities*

There has never been any difficulty about granting in English courts the customary jurisdictional immunities to sovereigns and Governments within the British Empire; indeed, the cases have gone beyond what international law would strictly require.¹ This may well be because the matter was thought of as a rule of common law rather than as one pertaining to international law and relations. The position of the independent members of the Commonwealth, however, was raised for the first time in *Kahan v. The Federation of Pakistan*,² where the question was whether the State of Pakistan enjoyed sovereign immunity from the exercise of municipal jurisdiction in England. The Secretary of State for Commonwealth Relations furnished a certificate to the Court, in which it was stated that

‘... an independent Dominion of Pakistan was set up by Section 1 of the Indian Independence Act, 1947. Under the subsequent provisions of that Act, and particularly Sections 5, 6 and 7, and by reason of constitutional conventions, Pakistan is a self-governing country within the British Commonwealth of Nations, sovereign both in external and internal affairs linked with the United Kingdom through a common allegiance to the Crown, but in other respects independent of it. In the view of the Secretary of State, therefore, Pakistan is an independent sovereign state.’

The plaintiff was in a dilemma. If Pakistan was in the position of an independent sovereign State it was entitled to sovereign immunity; on the other hand, if Pakistan was not in that position, the plaintiff’s action still could not lie because the Crown Proceedings Act, 1947, would not apply to the Crown in its capacity as Sovereign of Pakistan. In the Court of Appeal, counsel for the plaintiff was first inclined to argue that a State within the British Commonwealth and deriving its status from a British statute was in a position different from that of a foreign State, and further, that the common duty of allegiance might affect the issue. When, later, he was prepared to concede that the case might be argued on the assumption

¹ *Duff Development Co., Ltd. v. Kelantan Government*, [1924] A.C. 797; *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149.

² [1951] 2 K.B. 1003.

that Pakistan was in the same position as a foreign sovereign State, counsel for the defendant said that he preferred to keep that question open, and agreed that special considerations might apply to a member of the British Commonwealth. Eventually, however, both counsel agreed that, for the purposes of this appeal, Pakistan should be regarded as being in the same position as a foreign sovereign State. It is not surprising that in these circumstances the Court decided that Pakistan was entitled to immunity and that the action would not lie. Whether international law requires that answer in a case involving ordinary trading is another matter; but it is the answer which has become so embedded in English precedents that it is doubtful how far an English court is now at liberty to re-examine the international law on the subject. The case is not conclusive on the position of the independent members of the Commonwealth; but it is difficult to believe that their position could be held to be materially different from that of foreign States in the matter of immunity.

On the other hand, the envoys sent by members of the Commonwealth to each other have always been called High Commissioners to differentiate them from Ambassadors, and for many years they enjoyed neither the precedence nor the privileges of a diplomatic person. However, there has taken place a gradual assimilation of *inter se* and international relations in this respect, and there is now almost no difference of status or privilege between High Commissioners and other diplomatic envoys. The questions of status and precedence were raised at the Imperial Conferences of 1923 and 1930,¹ and again at the Prime Ministers' Conference held in London in 1948. As a result of the 1948 meeting a direction was issued by the King that precedence among High Commissioners would in future be according to date of appointment and not, as hitherto, according to seniority of the Dominions they represented; and it was directed that the High Commissioners in London and the Ambassadors of Foreign States would henceforward rank in a 'common order of seniority based on their respective dates of arrival in the United Kingdom for the purpose of assuming their official duties', and that the High Commissioners be accorded the style of 'Excellency'.² The final step in this assimilation was taken in the United Kingdom by the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952.³ This places High Commissioners and other representatives of Commonwealth countries and of Ireland,⁴ and their staffs and servants, in virtually the same position as that enjoyed by diplomatic envoys in international law. Thus it is provided that the High Commissioner, &c., 'shall

¹ Cmd. 3717, p. 30.

² *London Gazette*, 24 December 1948.

³ 15 & 16 Geo. VI & 1 Eliz. II, c. 18.

⁴ S. 1 (6): 'The countries to which this section applies are Canada, Australia, New Zealand, the Union of South Africa, India, Pakistan, Ceylon, Southern Rhodesia, and the Republic of Ireland.'

be entitled to the like immunity from suit and legal process, and the like inviolability of residence, official premises and official archives as are accorded to the envoy of a foreign sovereign Power accredited to Her Majesty'.¹

This change of status and privilege does no more than reflect a change in function; for the functions and responsibilities of the High Commissioners have necessarily approximated more and more to diplomatic functions and responsibilities as the Dominions have attained sovereignty and independence.² It is obviously difficult now to avoid the conclusion that they enjoy diplomatic status and privileges in international law. If, for example, a question of immunity arose whilst a High Commissioner were travelling through a foreign country on his way to the country to which he was accredited, it seems likely that he could claim and would be accorded diplomatic status in the sense of international law. It is still possible to argue, of course, that *inter se* the position is governed by municipal or by Commonwealth law; but in this matter the distinction seems to be pointless as well as artificial and is unlikely to survive.

Much the same tendency to approximate more and more to the international position can be traced in the treatment of visiting armed forces from Commonwealth countries. Formerly, visits by His Majesty's Forces based in one part of his territories to the soil of another part created no legal problem; for the United Kingdom Naval Discipline Act,³ the Army Act,⁴ and the Air Force Act⁵ applied throughout the Empire. This simple solution became inappropriate after the growth of Dominion independence; for, on the one hand, the Dominions became capable of enacting legislation repugnant to that of the Imperial Parliament, and, on the other, they would no longer necessarily be bound by the legislation of that Parliament. The problem was considered by the Committee on the operation of Dominion legislation,⁶ which recommended as follows:

'In connection with the exercise of extra-territorial legislative powers, we consider that provision should be made for the customary extra-territorial immunities with regard to internal discipline enjoyed by the armed forces of one Government when present in the territory of another Government with the consent of the latter. Such an arrangement would be of mutual advantage and common convenience to all parts of the Commonwealth, and we recommend that provision should be made by each member of the Commonwealth to give effect to such customary extra-territorial immunities within its territory as regards every member of the Commonwealth.'

¹ S. 1 (1) (a). There is power to deny the privileges to any country denying reciprocity.

² High Commissioners sent from the United Kingdom to the Dominions have perforce gradually assumed diplomatic functions as the Governors General gradually became responsible to the local Government instead of to the United Kingdom Government.

³ 29 & 30 Vict., c. 109. See, however, s. 177.

⁴ 44 & 45 Vict., c. 58.

⁵ 7 & 8 Geo. V, c. 51.

⁶ Cmd. 3479, p. 17, para. 44.

This recommendation was considered by the Imperial Conference of 1930, which adopted the recommendation and left it to the individual Governments to devise the necessary municipal legislation.

The British Visiting Forces (British Commonwealth) Act, 1932,¹ was drafted as a pattern to be followed by the other Governments, which did in fact pass legislation almost exactly similar.² The main purpose of the Act was to enable the disciplinary courts of the visiting forces to operate without interference from the local courts. The Imperial Conference recommendation had assumed that what it called the 'customary immunities' would apply, and that could only mean those immunities recognized and sanctioned by international law. Indeed, when certain parts of the Bill were attacked in the House of Lords, Viscount Hailsham, Secretary of State for War, defended the Bill on the ground that it did no more than put Dominion visiting forces into the position enjoyed by foreign visiting forces under international law. He said:

'It is important to realize their position [i.e. of visiting forces from a foreign country] because all this much-attacked sub-section does is to put the Dominion forces in the same position, as far as discipline is concerned, as every foreign force is in when it visits our shores. With regard to a foreign force, the recognized principle of international law is that when one country invites or permits the force of another to come within its territory, then that force brings with it the principle of extra-territoriality and no court of the country visited can interfere in any way with its discipline. . . .'³

Thus the aim is frankly to put Dominion forces in the same position as foreign forces would enjoy under international law.⁴

The process of assimilation is completed by the British post-war legislation in the Visiting Forces Act, 1952,⁵ which gives visiting Dominion forces and certain visiting foreign forces identical privileges in the same Act.

¹ 23 Geo. V, c. 6.

² Australian Defence (Visiting Forces) Act, 1939 (No. 5 of 1939); Canadian Visiting Forces (British Commonwealth) Act, 1933 (23 & 24 Geo. V, c. 21); South African Defence Act (Amendment) and Dominion Forces Act, 1932 (No. 32 of 1932); New Zealand Visiting Forces Act, 1939 (3 Geo. VI, c. 36); Newfoundland Visiting Forces (British Commonwealth) Act, 1940 (4 Geo. VI, c. 29); for other British territories, Visiting Forces (British Commonwealth) (Application to the Colonies, etcetera) Order in Council, 1940, S.R. & O. No. 1373 of 24 July 1940; and Protectorate of Brunei Visiting Forces (British Commonwealth) Enactment, No. 3 of 1941.

³ H.L. Official Report, 30 December 1932, vol. 86, cols. 481-2.

⁴ It is interesting to note that an authority on this subject, seeking to establish what the international law on the subject is, uses the Visiting Forces (British Commonwealth) Act as evidence of international law. See Barton in this *Year Book*, 26 (1949), pp. 380 ff.

⁵ 15 & 16 Geo. VI & 1 Eliz. II, c. 67. S. 1 (1) provides that the countries to which any provision of the Act shall apply are:

(a) Canada, Australia, New Zealand, the Union of South Africa, India, Pakistan, or Ceylon, or
(b) any country designated for the purposes of that provision by Order in Council under the next following subsection.'

II. *Extradition*

Another Commonwealth institution which is modelled closely on international practice but which nevertheless still remains distinct is the practice of rendition under the Fugitive Offenders Act, 1881, the analogue being, of course, extradition under the Extradition Act of 1870. The Extradition Act could not apply to a Commonwealth country because the Act refers specifically to 'foreign countries'; and whatever else Commonwealth countries may be they are clearly not foreign. The parallel institution for the Commonwealth created by the Fugitive Offenders Act of 1881 is very like extradition except that in this case there is no 'treaty' involved, the whole machinery being the creation of municipal legislation. Moreover, the two procedures do differ in detail. For example, s. 19 of the Extradition Act, 1870, provides that a person extradited to this country may only be tried for offences 'proved by the facts on which the surrender is granted'; and this is in accord with a well-known rule of international law.¹ There is no such provision in the Fugitive Offenders Act, and it seems to be accepted, therefore, that this rule does not apply to the trial of persons surrendered under that Act.² One would not expect, of course, that these two institutions, though analogous, would be entirely alike, for in this matter the fact that the Commonwealth countries are not 'foreign' to each other is clearly material. In particular, one would not expect to find that, as between countries sharing the same allegiance, the well-known international law exception for political crimes would find any place. That exception, however important in international relations, is singularly inappropriate within a politically integrated society.³ Nevertheless, the natural tendency to assimilate rendition and extradition has led Lord Goddard C.J. to suggest a different conclusion. In *Re Government of India and Mubarak Ali Ahmed*,⁴ India sought and was granted rendition of a Pakistani citizen who was alleged to have committed forgery and fraud in India, and who had escaped and fled to England. His plea that the substantial charge against him in India was a political one was rejected on the facts,⁵ but Lord Goddard C.J., delivering the judgment of the Divisional Court, said:

'I am quite sure that in a proper case the court would apply the same rules with regard to applications under the Fugitive Offenders Act, 1881, as it does under S. 3 (1)

¹ *United States v. Rauscher* (1886), 119 U.S. 407.

² See Archbold, *Criminal Law*, 23rd ed., p. 70.

³ See Wade and Phillips, *Constitutional Law*, 4th ed. (1950), p. 191. ⁴ [1952] 1 All E.R. 1060.

⁵ *Ahmed's* case also raised another and more substantial point. It was pleaded for him that after India became a Republic, the Fugitive Offenders Act, 1881 (since by s. 12 it could be applied by Order in Council 'to any of Her Majesty's dominions') could no longer apply to India, which was no longer one of Her Majesty's dominions. (*Seemle*, moreover, that the Extradition Act, 1881, could not be applied to India, because India is not a 'foreign country'.) It was held, however, that the effect of s. 1 (1) of the India (Consequential Provisions) Act, 1949, was to continue the Act of 1881 in force for India.

of the Extradition Act of 1870. If it appeared that the offence with which the prisoner was charged was in effect a political offence, no doubt this court would refuse to return him';

and he went on to illustrate this situation from the well-known extradition cases of *Re Castioni*¹ and *Re Meunier*.² This, of course, was an *obiter dictum*, and with great respect it may be doubted whether it is good law; but it does illustrate the strength of the tendency in these matters to work towards a complete assimilation of Commonwealth and international law.

III. *Disputes between members of the Commonwealth*

Among the supposed consequences of the *inter se* doctrine is the impropriety of submitting inter-Commonwealth disputes to international tribunals. Thus, when the Commonwealth countries decided in 1929 to accept the Optional Clause of Article 36 of the Statute of the Permanent Court of International Justice, they signed the clause separately, but all excepting Ireland (which signed unconditionally), but including India, signed subject to the reservation of 'a dispute with the Government of any other Member of the League which is a member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree'.³ That reservation has remained in operation for all of the older members of the Commonwealth;⁴ Pakistan, however, signed the Optional Clause for the first time in 1948, and omitted from her acceptance the reservation of *inter se* disputes.

An explanatory memorandum issued by the United Kingdom Government offered the following reasons for the *inter se* reservation:

'Disputes with other members of the British Commonwealth of Nations are excluded because the members of the Commonwealth, though internationally units individually in the fullest sense of the term, are united by their common allegiance to the Crown. Disputes between them should, therefore, be dealt with by some other mode of settlement, and for this provision is made in the exclusion clause.'⁵

Or, as Sir Austen Chamberlain put it in the House of Commons, these were disputes 'we ought to settle for ourselves without foreign interference'.⁶ Even at this time, however, there was no agreement on the precise reasons for the *inter se* reservation, for whereas the more orthodox proponents of the doctrine felt that the express reservation was *ex abundanti cautela* and that the jurisdiction could not in the nature of things apply, others felt that

¹ [1891] 1 Q.B. 149.

² [1894] 2 Q.B. 415.

³ It is interesting to note that the Iraq acceptance has a similar reservation of 'disputes with the Government of any other Arab State, all of which disputes shall be settled in such manner as the parties have agreed or shall agree'.

⁴ Similarly, the General Act of 1928 was accepted by the United Kingdom, India, and the Dominions except Ireland, with the reservation of *inter se* disputes.

⁵ Keith, *Speeches and Documents on the British Dominions*, 1918-1931, pp. 410-17.

⁶ *The Times* newspaper, 28 January 1930.

the reservation needed to be explicit to be valid, and that the reasons for it stemmed from expediency rather than from juristic necessity. Thus, the representative of the Union of South Africa, in signing the clause, declared that in the view of his Government *inter se* disputes were justiciable by the Court, but that they preferred as a matter of expediency to settle them by other means; likewise the Canadian representative said his Government reserved *inter se* disputes 'for the sole reason that it is its expressed policy to settle these matters by some other methods'.¹

The reservations to the Optional Clause suggested that there either was or soon would be in existence alternative, purely Commonwealth, institutions for the settlement of *inter se* disputes. There was, of course, the Judicial Committee of the Privy Council, which as a matter of history was an appropriate tribunal for *inter se* disputes, as well as providing a court of appeal from Commonwealth Courts; for such disputes were formerly settled as a matter of internal law by the exercise of the prerogative with the advice of the Privy Council; and indeed the Privy Council had on one occasion been called upon to settle a boundary dispute.² But it was precisely because the Privy Council was so closely associated with the United Kingdom rule that it was not likely to be an acceptable tribunal for disputes between the newly independent members; as a Canadian writer put it: 'it smacks of pre-Commonwealth days, when inferiority not equality of status was the rule'.³ Some improvisation was, therefore, required, and the Imperial Conference of 1930 attempted to fill the gap, following the suggestions already made by the Committee on the Operation of Dominion Legislation in 1929. The Conference was cautious to a degree. It was not prepared to contemplate the creation of a permanent court, but contented itself with recommending *ad hoc* tribunals of five members selected from a panel, rather after the fashion of the Permanent Court of Arbitration. None of the five members, including the chairman, might be from outside the Commonwealth, the jurisdiction was to be confined to so-called 'justiciable' disputes, and moreover it was to be entirely voluntary, any different recommendation being impossible 'in the absence of general consent to an obligatory system'.⁴

Thus we find the surprising situation that the members of the Commonwealth were not prepared to go anything like as far for inter-Commonwealth disputes as for disputes with foreign countries. The 1930 proposals

¹ See Stewart, *Treaty Relations of the British Commonwealth* (1939), p. 351.

² 43 T.L.R. 289. In this case the Board apparently felt no difficulty in appealing to international law and relied, *inter alia*, on citations from Westlake, Hall, and Lawrence. The case was referred to the Board under 3 & 4 W. IV, c. 41, s. 4.

³ MacKay in *Canadian Bar Review*, 1932, p. 338.

⁴ Cmd. 3717, pp. 22-24. See also Lauterpacht, *The Function of Law in the International Community* (1933), p. 447, n., where it is pointed out that 'justiciable' in relation to a jurisdiction which is voluntary means nothing at all.

were at very much the stage that had been reached in international relations in 1899. Moreover, even the mild and tentative proposals of 1930 were abortive, for no tribunal of the kind recommended has ever been constituted; and it seems now very unlikely that there ever will be one.¹ It is evident that behind this curious manifestation of the *inter se* doctrine there was something more than a mere feeling that inter-Commonwealth disputes should be settled without interference from foreigners. There was also an unwillingness to settle inter-Commonwealth disputes by any form of compulsory, and perhaps even of voluntary, judicial procedure. It was no doubt due partly to the usual shyness of rigid organization and of legal institutions, and partly also certainly to the difficulty of reconciling so many different views of the nature of the Commonwealth relationship; and, of course, it is also no secret that there were concrete issues, such as immigration policies, which some members were afraid a tribunal might attempt to take out of the sphere of purely domestic competence.² However that may be, the excessive caution of 1930 was in some ways unfortunate. It was probably the last opportunity to create a tribunal which might have welded the conventions of the Commonwealth into a consistent and resistant jurisprudence. As it is, it now seems doubtful how far the Commonwealth conventions will ultimately be able to stand against the erosion of international law.

Since the end of the Second World War the position that *inter se* disputes ought in no case to be submitted to international tribunals has been abandoned. Of course the old reservations to the Optional Clause of Article 36 of the Statute of the World Court remain in force; nevertheless the Court has now in many instances been given jurisdiction under the first paragraph of Article 36, in a large number of treaties containing clauses under which disputes arising under the treaty are, where other modes of settlement fail, to be referred to the Court. Were these treaties all multilateral it might still just be possible to argue that the jurisdiction clause cannot apply to *inter se* disputes; but this argument is no longer open even in theory, because there is now a considerable body of purely *inter se* treaties which likewise confer jurisdiction on the Court.³

¹ An attempt was made in the Anglo-Irish controversy over the Land Annuities, but the Irish Government wanted a foreign chairman.

In 1932 the United Kingdom and Indian Governments set up an arbitral tribunal, with a former Solicitor General of Australia as chairman, to adjudicate upon a dispute concerning the cost of maintaining the Indian Army; this was not, however, in accordance with the 1930 proposals, but an improvisation *ad hoc*.

² Keith, *op. cit.*, p. 416, n.

³ E.g. the following concerning Air Services: India/Pakistan, 23 June 1948; Ceylon/Pakistan, 3 January 1949; Australia/Pakistan, 13 June 1949; Australia/India, 11 July 1949; Australia/Ceylon, 12 January 1950; Canada/New Zealand, 16 August 1950.

Those to which the United Kingdom is a party do not confer jurisdiction directly upon the Court: e.g. Ceylon/United Kingdom, 5 August 1949; Ireland/United Kingdom, 5 April 1946. However, these confer jurisdiction on the Council of the International Civil Aviation Organization, and the Chicago Convention of 7 December 1944 in chapter xviii provides in certain

These concessions do not necessarily mean that the *inter se* doctrine in relation to disputes has been entirely abandoned; for these grants of jurisdiction are all confined to disputes arising out of the particular treaties in question. In other words, they are disputes in and about international law. A lifting of the reservation from the Optional Clause, on the other hand, might seem to confer jurisdiction in matters which involve Commonwealth understandings and conventions; and it might still very reasonably be thought that a body like the International Court of Justice would be an unsuitable tribunal in this kind of dispute. Nevertheless once the *total* exclusion of *inter se* disputes from international tribunals has been abandoned, the line between those conceded to international relations and those still reserved to *inter se* relations becomes very tenuous; and indeed, which side of the line a dispute falls might itself be a matter of dispute; and since international tribunals decide their own jurisdiction, the *inter se* objection is not likely to be sustained in these circumstances.¹

However, the maintenance of the *inter se* reservation to the Optional Clause seems singularly pointless now that what remains of the *inter se* doctrine is certainly not strong enough to oust the jurisdiction of the other organs of the United Nations. Indeed, the very refusal of jurisdiction to the World Court over *inter se* disputes has greatly increased the probabilities that some of the more intractable of these disputes will be taken to a less satisfactory, political, forum. We have already seen the Kashmir dispute between Pakistan and India put into the hands of the United Nations,² and the old dispute between India and South Africa about the treatment of persons of Indian race in South Africa argued before the General Assembly and Committees of the General Assembly.³ Thus, the aim to settle *inter se* disputes 'without foreign interference' has miscarried indeed. The true irony of the situation becomes apparent in the treatment by the General Assembly in the latter case of the South African plea to the jurisdiction on the ground that the matter was one of domestic jurisdiction within the circumstances for appeal from a decision of the Council to the International Court of Justice. This form is also followed in some agreements between the United Kingdom and foreign countries, e.g. United Kingdom/Sweden, 27 November 1946. The Agreement between the United Kingdom and South Africa of 26 October 1945, however, provides for settlement of disputes by an Arbitral Tribunal the composition of which 'shall be decided by agreement between the Contracting Parties'.

¹ It is interesting to speculate what would be the position of a Commonwealth *inter se* tribunal or court in relation to the United Kingdom Defamation Act, 1952, by which the verbatim reports of certain institutions set out in the Schedule are privileged. Apart from any court 'exercising jurisdiction throughout any part of Her Majesty's dominions', which an *inter se* tribunal clearly would not be, there remains only an 'international court'. An international court is here defined as 'the International Court of Justice' and any other judicial or arbitral tribunal deciding matters in dispute between States'. It seems that there would be nothing for it but to choose between abandoning the doctrine that *inter se* relations are not international, on the one hand, or refusing privilege to the reports of an *inter se* court, on the other.

² Under Art. 35 of the Charter.

³ Under Arts. 10 and 14 of the Charter.

meaning of Article 2 (7) of the Charter.¹ The plea was rejected in a purely political decision, whereas before the International Court of Justice the same plea might well have resulted in stopping the proceedings *in limine*. The Union Government tried in vain to persuade the General Assembly to ask the Court for an advisory opinion on the legal issues involved in the plea. Of course, 'domestic' in the *inter se* sense is not the same as domestic in the sense of international law or of the Charter; but it is partly for this very reason that the reservation to the Optional Clause may now be so easily outflanked by a change of forum. This possibility must raise doubts concerning both the merits and utility of the reservation.

IV. *Treaties*

The *inter se* doctrine has also played a very considerable part in the complicated rules governing Commonwealth treaties. For present purposes there is no need to delve into the history of the development of the independent treaty-making power of the Commonwealth countries nor, other than incidentally, to examine the various treaty-making procedures.² What is in point is the juridical nature of the treaty or quasi-treaty relationships between Commonwealth countries, and whether in any respect they are treaty relationships in international law; and this question arises in two principal forms: firstly, there are agreements made simply between Commonwealth countries, and secondly, there are general multilateral treaties to which two or more Commonwealth countries are parties. In what might be called its classical form the *inter se* doctrine denied in both these situations the existence of any obligations at international law *inter se*.

The clearest statement of the position is to be found in some well-known passages in the Report of the Imperial Conference of 1926.³ The Report was concerned primarily with treaty-making procedures, but the procedures were recommended very much with the *inter se* doctrine in mind; and the best safeguard for the *inter se* position seemed to be to adopt, wherever appropriate, the Heads of State form of treaty. Thus, the Report recommended:

'The making of the treaty in the name of the King as the symbol of the special relationship between different parts of the Empire will render superfluous the inclusion of any provision that its terms must not be regarded as regulating *inter se* the rights and obligations of the various territories on behalf of which it has been signed in the name of the King. . . .'

Where, however, the treaty is intended to apply *inter se*, the Heads of State

¹ Needless to say, the Union did not even attempt to argue that the dispute was 'domestic' in the sense of the *inter se* doctrine.

² On this whole question see Stewart, *op. cit.*

³ Cmd. 2768.

form was clearly inappropriate, and in this case the Report therefore recommended as follows:

'In the case of some international agreements the Governments of different parts of the Empire may be willing to apply between themselves some of the provisions as an administrative measure. In this case they should state the extent to which and the terms on which such provisions are to apply. Where international agreements are to apply between different parts of the Empire, the form of a treaty between Heads of States should be avoided.'

The employment of the Heads of States form of treaty in order to prevent any suggestion that the treaty imports obligations *inter se*, requires a word of comment. The idea is simple. If the King appears as a single party to the treaty, it cannot be argued he has obligations owed to himself arising out of the treaty. Consequently, the participation, or non-participation, of the different parts of the Commonwealth are, as it were, behind the curtain, and of no juridical concern to the other parties to the treaty. The argument for the strict *inter se* interpretation of a treaty in this form seems to be unassailable. It does depend, however, on the willingness of other contracting States to accept this form of treaty. If the whole Commonwealth were always in substance as well as in form a party to the treaty the position would of course be unobjectionable, but what happens in practice is that behind the curtain of the artificial single party the separate members of the Commonwealth come and go as they please. This is doubtless very convenient for the Commonwealth, but other States cannot be expected always to be willing to contract on that basis.

Turning now to the second part of the 1926 recommendation, we find that where a multilateral treaty is intended to create *inter se* obligations, and where therefore the Heads of State form is not appropriate, the treaty is nevertheless not to be regarded as creating *inter se* obligations *suo proprio vigore*, but that the obligations are to be undertaken 'as an administrative measure'. So long as this position is accepted by Commonwealth members, no doubt the *inter se* position is preserved; but 'as an administrative measure' is obviously a mere form of words, and it would be both difficult and probably unprofitable to attempt to give it any meaning.

In the inter-war period it was the usual practice in inter-governmental agreements to safeguard the *inter se* position by express stipulations. Thus, the Statute on Freedom of Transit, signed at Barcelona in 1921, contained the qualification: 'It is understood that this Statute must not be interpreted as regulating in any way rights and obligations *inter se* of territories forming part or placed under the protection of the same sovereign State, whether or not these territories are individually Members of the League of Nations.'¹ Similarly, in the Barcelona Convention on the Régime of Navigable Water-

¹ *United Kingdom Treaty Series*, 1923, No. 27, Article 15.

ways of International Concern.¹ Policy has not been consistent, for at the Second Geneva Conference in 1925 a stipulation of this kind was deliberately omitted from the draft, in order, the legal adviser of the British delegation said, to make the obligations applicable *inter se*; which seems to be an admission that without express reservations the treaty does apply *inter se*.² Yet the Warsaw Convention of 1929 on International Air Transport was, at the instance of the British delegation, cast in the Heads of States form in order that 'international carriage' would be so defined that transport between members of the Commonwealth was excluded. Thus, it would appear from these precedents that it has generally been thought desirable, and possibly necessary, to safeguard the *inter se* position, if not by adopting the Heads of States form, then by express reservation. Where an attempt has been made, as at the Arms Traffic Conference of 1925, to raise the *inter se* reservation by inference, this has not been without protest from the other contracting parties, on the ground that it creates 'a grave situation of inequality'.³

The *inter se* doctrine applied to treaties was, of course, neatly raised in connexion with the obligation of Members of the League of Nations to register their treaties in accordance with Article 18 of the Covenant. It was a natural consequence of the *inter se* doctrine that agreements made solely between members of the Commonwealth ought not to be registered as treaties. As the British Government put it in their protest to the Secretary-General over the registration by the Government of the Irish Free State of the Articles of Agreement of 1921:⁴

'Since the Covenant of the League of Nations came into power, His Majesty's Government have consistently taken the view that neither it, nor any conventions concluded under the auspices of the League, are intended to govern the relations *inter se* of the various parts of the British Commonwealth. His Majesty's Government consider, therefore, that the terms of Article 18 of the Covenant are not applicable to the Articles of Agreement of 6th December, 1921.'

This is a twofold argument: firstly, that the Articles of Agreement, being between two Commonwealth countries, were not a 'treaty or international engagement';⁵ and secondly, that as the Covenant itself could not apply

¹ *United Kingdom Treaty Series*, 1923, No. 28, Article 25.

² *League of Nations*, C. 760, M. 260, 1924, XI, vol. i, p. 311.

³ A full description will be found in Stewart, *op. cit.*, pp. 344 ff. See also Noel-Baker, *op. cit.*, pp. 289-305.

⁴ The details of the controversy are too well known to need recapitulation. See Stewart, *op. cit.*, pp. 338 ff.

⁵ It is interesting to note that in 1932, during the controversy over the Land Annuities, when the Irish Government denied the binding character of certain agreements made between the two Governments, the British Government replied that 'His Majesty's Government in the United Kingdom regard undertakings of this character as binding in law and honour' on both countries (Keith, *op. cit.*, pp. 468-9). It is made clear, however, what was the 'law' that the United Kingdom Government had in mind here, since they had already denied that it could be international law.

inter se, there could be no obligation anyway to register an *inter se* agreement under Article 18. The argument that the Covenant itself does not apply *inter se* goes to the hub of the matter; because of course it was the separate membership of the League by each Dominion, and their separate signature of the Covenant, that had always been regarded as the talisman of their emergence into sovereign independence. There had, however, been no intimation, express or implied, of the *inter se* doctrine to the other parties to the Covenant, and there can be little doubt that an international court would have preferred the argument of the Irish Government that:

'The obligations contained in Article 18 are, in their opinion, imposed in the most specific terms on every member of the League and they are unable to accept the contention that the clear and unequivocal language of that Article is susceptible of any interpretation compatible with the limitation which the British Government now seek to read into it.'

The question was ventilated at the Imperial Conference of 1926, when the *inter se* doctrine was reaffirmed, and the Irish Free State loyally accepted this decision. Nevertheless, practice was never entirely consistent even in the inter-war period, for the Union of South Africa registered a number of *inter se* agreements after 1926. However, even the Union did not follow any consistent policy, and in general it may be said that *inter se* agreements were not registered.

What is the position of the *inter se* doctrine now, under the régime of the United Nations, and after the great changes that have occurred in the Commonwealth since the end of the Second World War? In the first place we may say that what might be called the outward sign of the doctrine, namely, the refusal to register *inter se* treaties, seems to have gone altogether. In a written answer in the House of Commons on 19 February 1951, the Minister of State made it clear that the United Kingdom Government is registering with the United Nations treaties or agreements both with foreign countries and with other members of the Commonwealth as soon as they come into force.¹ It would, quite apart from other reasons, have been difficult to maintain the policy of non-registration after the establishment of the United Nations; for whereas Article 18 of the Covenant of the League had said that treaties would not be binding until registered, paragraph 2 of Article 102 of the Charter provides that a party may not invoke an unregistered treaty or agreement before any organ of the United Nations; yet several recent *inter se* agreements confer jurisdiction upon an organ of the United Nations. In short it is manifest that, in the context of increasing social regulation by international bodies, to insist on the strict logic of the *inter se* doctrine in this matter would be impracticable.

Even if the point about registration be conceded it does not necessarily

¹ See *International Law Quarterly*, 4 (1951), p. 264.

follow that the substance of the doctrine is also disposed of. It might still be argued that although *inter se* agreements are not international engagements they are registered as if they were, merely as a matter of administrative convenience. How much, then, is left of the *inter se* doctrine concerning treaties? It would seem very little is left, and for the following reasons.

In the first place, the major safeguard relied upon by the 1926 Imperial Conference Report—the Heads of State form of treaty—is nowadays almost a rarity.¹ The strong tendency, especially since the close of the Second World War, has been towards the employment of the inter-governmental form of agreement or of the exchange of notes for almost all purposes, including the most important. Thus, to take one example, although the Paris Convention of 1919 on Aerial Navigation was between Heads of States, and the British Empire and Commonwealth thus formed one High Contracting Party for the purpose of various definitions within the Convention, the Chicago Convention of 1944 which replaced it is an agreement between Governments, and each of the members of the Commonwealth is a separate contracting party, signing separately and ratifying separately. There is now one remarkable example, where the United Kingdom Government has purported by Statutory Order to abandon the 1926 Heads of State formula in an existing treaty originally signed and ratified in that form. It will be remembered that the Warsaw Convention of 1929 on the carriage of goods by air was, partly at the request of the British delegate to the Conference, cast in the form of a treaty between Heads of States. Further, by the terms of the Convention ‘international carriage’ was defined in terms of high contracting parties to the Convention.² In short, it was by this means made quite clear that the Warsaw rules did not apply *inter se*. The Convention was carried out in the United Kingdom by the Carriage by Air Act, 1932, which gave powers by Order to define, conclusively for the purposes of English law, the parties to the Convention. Several Orders have been made in the form to be expected, viz., ‘His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India’ appears as one High Contracting Party, and there is set out in an adjoining column the Commonwealth territories in respect of

¹ Moreover, the orthodox argument from this form of treaty is by no means unassailable now that the indivisibility of the Crown is challenged; see now the changes in the Royal style made under 1 & 2 Eliz. II, c. 9.

² Article 1 (2): ‘For the purposes of this Convention the expression “international carriage” means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination . . . are situated either within the territory of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of this Convention.’

which His Majesty is from time to time a High Contracting Party. To this territorial list there were added, on their respective ratifications, Australia and Ceylon in 1935, and New Zealand in 1937;¹ and so on. The latest Order, however, makes a remarkable alteration. In the Carriage by Air (Parties to Conventions) Order, 1951,² those Commonwealth independent members to whose territory the Convention has been applied from time to time, now appear separately in the list of High Contracting Parties. Moreover, the dates given opposite these entries are the dates on which the Convention was extended to their territories under the earlier Orders.³ This, which presumably was done with the agreement of the Governments concerned, purports completely to alter the scope of the definition clause of the Convention, and makes the Warsaw rules governing 'international carriage' applicable to *inter se* carriage. The Order is conclusive for an English court. It would be interesting to speculate whether an English court would accept it as affecting a flight made before the date of the Order but after the date when the member concerned is shown in the Order to have become a High Contracting Party.

Secondly, the fact that so many recent *inter se* treaties—many of them simply bilateral agreements between two Commonwealth countries—have had clauses conferring jurisdiction over disputes arising out of the treaty upon the International Court of Justice, or sometimes upon some international quasi-judicial body such as the Council of the International Civil Aviation Organization, shows that, at any rate for the purposes of these treaties, the *inter se* doctrine has been abandoned: for, of course, the International Court of Justice could not apply any law other than international law without going outside the terms of Article 38 of its own Statute. Therefore it is an inescapable conclusion that these treaties are operative in international law, and solely in international law; and therefore that the doctrine that *inter se* treaty relations cannot by their nature be international is no longer in accord with the facts.

Finally, there is the fact that in both the Commonwealth disputes that have come before the United Nations—the Kashmir question, and the question of the treatment of Indians in South Africa—it has been assumed by the United Nations and by both parties in both disputes that the Charter of the United Nations is binding *inter se*;⁴ indeed the contrary

¹ See Carriage by Air (Parties to Conventions) Order, 1939, S.R. & O., 1939, No. 733.

² S.I. 1951, No. 1386.

³ Canada, 1947; New Zealand, 1937; Australia, 1935; India, 1935; Pakistan, 1935; Ceylon, 1935; Republic of Ireland, 1935.

⁴ The form of signature for Commonwealth countries in the Charter was different from that employed for the Covenant of the League. In the Covenant, the Dominions signed in order of seniority under the general heading of 'British Empire'. In the Charter, the block signature was abandoned, and the independent members of the Commonwealth signed in their alphabetical order in the complete list of signatories.

argument is not possible once the matter has emerged into the international sphere, where only the rules of international law can be applied.

We are driven therefore to the conclusion that the *inter se* doctrine in relation to treaties is virtually obsolete: for the one remaining case where it might still apply is the now very rare one of a treaty between Heads of States; and even this is not a true exception, for the result there follows from the form in which the parties have chosen to contract rather than from any general principle of law. But it does not by any means follow that the *inter se* doctrine in relation to *inter se* agreements in general is obsolete; for there still remains the important question of what constitutes a treaty?

Some of the definitions of treaty to be found in the books, and even in the judgments of the World Court,¹ are alarmingly comprehensive. Yet, even international law, like every other law, must have a rule that no legally binding contract was made when none was intended to be made.² Otherwise, indeed, there would seem to be a distinct danger that international law might be thought to comprehend within its provenance and within the definition of treaty many of the Commonwealth conventions and understandings; more especially when these have been written down, as it were, in the form of a 'Final Act' of Imperial Conferences or of the less formal meetings that have now taken the place of the old Imperial Conferences. However, it is certain that very many of the decisions and agreements made at such meetings were never intended to be binding on anyone, even in terms of what might be called Commonwealth constitutional law;³ for the convention of equality of status with its corollary of ultimate freedom of action is frequently overriding. It is obviously of great importance to the future of the Commonwealth that agreements of this sort should be kept right outside the sphere of obligation at international law. An attempt to spell international treaties out of these manifestations of Commonwealth co-operation would be unfortunate. Their efficacy depends upon a tradition of convention and co-operation in terms quite different from the international law rules concerning treaties.⁴

¹ See *P.C.I.J.*, Series A/B, No. 53.

² See International Law Commission, *Report on the Law of Treaties* by Professor Lauterpacht, Article 1: 'Treaties are agreements between States, including organizations of States, intended to create legal rights and obligations of the parties.' U.N. Doc. A/CN.4/63, 24 March 1953.

³ Though others, of course, have actually been made into true law, e.g. in the Statute of Westminster.

⁴ The shyness of the treaty relationship *inter se* is not without political wisdom. Speaking of the rejected proposal in 1948 that the new Republic of India might be associated with the Commonwealth on a treaty basis, Dr. Malan said:

'I personally came to the conclusion that it would be wrong and dangerous, particularly for South Africa, to think for a moment of accepting . . . that India would be associated with the Commonwealth on a treaty basis . . . for this reason, that as soon as any country enters the Commonwealth on a treaty basis she is in a position where she is able to impose conditions and

There appears, then, to be an uneasy borderland between *inter se* agreements and treaties proper; as was discovered by the South African Government in the dispute with India, when the Union resorted to an argument derived from the *inter se* doctrine, not *eo nomine* but nevertheless unmistakably. It will be recalled that the main legal argument of the Union Government was that the matter was 'domestic' within the meaning of Article 2 (7) of the Charter and for that reason, therefore, outside the jurisdiction of the United Nations. Admittedly, however, a matter may be taken out of the domestic sphere into the international sphere if it has become the subject of treaty regulation.¹ India pointed to the so-called Capetown Agreement of 1927, and to a joint communiqué issued by the two Governments in 1932. The Union Government had therefore to show that these two agreements were not treaties. Among other arguments she resorted to the *inter se* doctrine: first the technical argument that the alleged treaties had not been registered under Article 18 of the Covenant and therefore were not binding; but then the substantial *inter se* doctrine:

'Up to the time of the present proceedings it [the agreement of 1932] has always been recognized to be merely a declaration of policy by two members of the British Commonwealth of Nations, accustomed to deal with each other not at arm's length, by means of legalistic formulas, but as members of a family of nations, in a spirit of free and voluntary co-operation and friendly alignment of policies. This agreement, therefore, is not an instrument creating international rights and obligations, and does not give rise to any exception to the domestic rule.'²

It is important to appreciate the true nature of the Union's argument. It is not that the matter being *inter se* is therefore domestic in the sense of international law. It is that the two agreements relied on by India, being *inter se* agreements and intended as such, were therefore not treaties, and therefore could not be said to take the issue out of the domestic sphere, assuming it was there in the first place. In other words, the international law rule to which the *inter se* doctrine is synchronized is not the domestic jurisdiction

those conditions, in connexion with India's relations with us, would cause great difficulties especially for South Africa.'

And again:

'The relationship of the individual members of the Commonwealth . . . remains unchanged; [each] . . . retains the freedom that it has enjoyed hitherto in practice; the individual member of the Commonwealth is not bound by any policy laid down at the Commonwealth Conference or Prime Ministers' Conference, or at the Imperial Conference as it was known before. They bind themselves to consult one another and, as far as possible, to co-operate with one another. . . . To that extent they bind themselves morally. But nevertheless, every member has the fullest right to differ from the other members and even go so far as to oppose one another at international conferences. . . .'

See Mansergh, *Documents and Speeches on British Commonwealth Affairs, 1931-1952*, at p. 860.

¹ See *P.C.I.J.*, Series B, No. 4.

² Statement by the late Field-Marshal Smuts on the Legal Aspects of the Problem; reprinted in *Principal Documents relating to consideration by the United Nations of the Representations of the Government of India on the Treatment of Indians in the Union of South Africa (1947)*.

rule but the rule that an agreement which is never intended by the parties to it to create legally binding obligations cannot be held to do so.

This then would seem to be the true ambit of the modern *inter se* doctrine in respect of agreements; for it still remains true that certain *inter se* agreements intimately concerned with the Commonwealth relationship itself are not international, in the sense that they are not intended to create any obligations at international law. This is, indeed, to do no more than to restrict the *inter se* doctrine to what has always been its proper sphere; for the former notion that it must apply to all *inter se* agreements, even those concerned with purely international law institutions, was an unnecessary hypertrophy of what is basically a valuable and necessary idea. It had, however, this amount of wisdom behind it, that once it is acknowledged that some *inter se* agreements may be international, it is not easy to draw any fast line between those that are and those that are not, and the line tends always to be a shifting one revealing an ever-increasing area left to international law.

One particular aspect of treaties, the most-favoured-nation clause, requires separate treatment. It is well-established doctrine that favours granted between members of the Commonwealth do not bring into operation the most-favoured-nation clause; or, to put it another way, that Imperial preference is an exception to the most-favoured-nation clause. Imperial preference is for the most part a twentieth-century cult invented by the Dominions as their reply to proposals once popular in this country for turning the Commonwealth into a customs union. The acquisition by the Dominions of political independence necessarily carried with it the acquisition of tariff personality, and hence the possibility of inter-Commonwealth tariff preferences; but there was obviously a danger that such preferences might engage the most-favoured-nation clauses in treaties with third States. It was the familiar dilemma. Imperial preference assumed that the Dominions were independent States, having separate tariff personality; but the acknowledgement of that very assumption might operate the most-favoured-nation clause in treaties with third States and so stultify the system. The solution was to have recourse to the *inter se* doctrine as a ground for asserting that inter-Commonwealth relations, including tariff relations, were domestic and not international. So, by 1910, it was found possible in a White Paper to make the confident statement that: 'It may now be regarded as a settled principle that trade agreements between parts of the British Empire are to be considered as matters of a domestic character which cannot be regarded as discriminatory by any foreign power.'¹

¹ Cmd. 5369 of 1910, para. 122.

See also Keith, *Constitutional Law of the British Dominions* (1933), p. 82: 'For, if relations between the Dominions and the United Kingdom were international, foreign States could demand the advantage of them under most favoured nation clauses in treaties.'

It must be observed, however, that the discovery of an exception to the most-favoured-nation clause is no novelty in international law. Exceptions have frequently been made and accepted in respect of customs unions, frontier zone traffic, and also in favour of groups of countries standing towards each other in particular political, ethnical, or geographical relationships.¹ It would even be allowed by some that the first two of these exceptions may be implied,² though the British view would appear to be to the contrary.³ Moreover, the British practice is to stipulate expressly for the exception of inter-Commonwealth arrangements: the most-favoured-nation clause in modern commercial treaties concluded by the United Kingdom promises treatment not less favourable than that enjoyed by any other *foreign* country, 'foreign' sometimes being defined in the treaty.⁴ Further, the statement issued after the Ottawa Conference in 1932—the high-water-mark of Imperial preference—seems to imply that the exception needs express reservation from the most-favoured-nation clause.⁵

It seems doubtful, therefore, whether it was ever necessary to regard this question as being anything more than one of interpretation of treaties. A party to a treaty may restrict his obligations in any way provided only that the other party is prepared to agree. The reservation of *inter se* favours from the ambit of the most-favoured-nation clause is no more than a common-form clause in British treaties; though it is perhaps also just arguable that it is so well known that it might be implied. There is nothing to be gained in resting this result on the further ground of the *inter se* doctrine: that the matter rests on considerations which are a necessary concomitant of the nature of the Commonwealth association. For there can be little doubt that an independent member of the Commonwealth has the capacity, if it be so minded, to conclude a treaty with a foreign power granting

¹ E.g., there have been the Iberian Clause, the Baltic Clause, the Scandinavian Clause, the South-American Clause, &c.

² See Report of a *League of Nations Economic Committee on Tariff Policy and the Most-Favoured-Nation Clause*, II. *Economic & Financial*, 1933, II. B. 1.

³ See McNair, *The Law of Treaties* (1928), p. 294.

⁴ See, for example, the Agreement on Trade and Commerce between the United Kingdom and Lithuania of 6 July 1934: T.S. No. 20 of 1934, which provides:

'It is understood that in this Agreement the term "foreign country" in relation to the United Kingdom means any country not being a territory under the sovereignty of His Majesty the King of Great Britain and Ireland and the British Dominions beyond the Seas, Emperor of India, or under His Majesty's suzerainty, protection or mandate; and the term "foreign import" means import from foreign countries so defined.'

⁵ 'In the first place, the Conference discussed the general question of the relationship between inter-Commonwealth preferences and the most-favoured-nation clause in commercial treaties with foreign Powers. Each Government will determine its particular policy in dealing with this matter, but the representatives of the various Governments on the Committee stated that it was their policy that no treaty obligations into which they might enter in the future should be allowed to interfere with any mutual preferences which Governments of the Commonwealth might decide to accord to each other, and that they would free themselves from existing treaties, if any, which might so interfere. They would, in fact, take all the steps necessary to implement and safeguard whatever preferences might be so granted.' See Cmd. 4174.

most-favoured-nation treatment inclusive of favours granted within the Commonwealth; and that the validity of the grant would be unassailable in constitutional and in international law. Indeed, there is a precedent even before the Ottawa Conference.¹

The point is in fact conceded in modern practice, notably in the acceptance by the Commonwealth countries of the General Agreement on Tariffs and Trade (G.A.T.T.),² which in Article 1 has a general most-favoured-nation clause. Admittedly the preferences existing between Commonwealth countries and Ireland are excepted by clause 2 of Article 1; but by clause 3 the permissible preferences are keyed to the most-favoured-nation rate and it is not permissible to grant preference margins in excess broadly speaking of those prevailing on 10 April 1947. Thus, the preference rates between members of the Commonwealth are now controlled in part by a general treaty operating in international law.³ Nor is this by any means the only treaty by which Imperial preference is restricted.⁴

In short, whilst a special tariff relationship between the Commonwealth (and such countries as the Commonwealth does not regard as 'foreign countries') is still in part maintained, this is not a matter in which it is necessary to call in aid the *inter se* doctrine, for the necessary exceptions are stipulated for expressly. Finally, the inclusion of Eire within the Commonwealth scheme, though she is no longer a member, demonstrates that the *inter se* doctrine is at least not a necessary ingredient in the system of preferences.

V. Nationality

Formerly the British Empire had a single, common nationality in every sense of the word. That simple solution could hardly be maintained in the context of the evolution of the Dominions towards sovereign independence. The British Nationality and Status of Aliens Act of 1914, however, was

¹ The Union of South Africa made such a Treaty of Commerce and Navigation with Germany in 1928 (*T.S.*, No. 6, 1930). After the decisions of the Ottawa Conference the Union took steps to secure her release from these obligations, which she obtained in October 1932.

² Cmd. 7258.

³ When, for example, the United Kingdom wished to increase unbound tariffs on certain horticultural products from non-Commonwealth countries without putting duties on similar Commonwealth products, it was necessary to secure a general waiver from the GATT Conference. See *The Financial Times*, 27 October 1953.

⁴ The following is the list of United Kingdom bilateral treaties restricting Imperial preferences given by the President of the Board of Trade in the House of Commons on 24 April 1952 (see *International and Comparative Law Quarterly*, 1 (1952), p. 578): with Argentina, 1 December 1946 (Cmd. 5324); Cuba, 19 February 1937 (Cmd. 5867); Denmark, 24 April 1933 (Cmd. 4424); Iceland, 19 May 1933 (Cmd. 4331); India, 20 March 1939 (Cmd. 5966); Poland, 27 February 1935 (Cmd. 4984); Sweden, 15 May 1933 (Cmd. 4421); Turkey, 3 February 1940 (Cmd. 6171); United States of America, 17 November 1938 (Cmd. 5882). See also the Congo Basin Treaties, 1885-1919; and the United Nations Trusteeship Agreements for the Cameroons, Tanganyika, and Togoland.

enacted in the expectation that the Act would be adopted by the member States of the Commonwealth¹ and so provide a common code. This expectation was substantially realized in the municipal legislation of the several members. In this way there was still maintained throughout the Commonwealth a 'common status' of 'British subject'; and great importance was always attached to its preservation.² Although, however, the legislation was in substantially similar terms, anomalies began to appear, and diversity was bound in the nature of things to grow rather than diminish. After the Second World War, the common code scheme was completely shattered by the Canadian Citizenship Act of 1946.³ Furthermore, even the very name 'British subject' had become inappropriate in several parts of the Commonwealth. The new situation created by the Canadian Act was the subject of a Conference of Experts held in London in 1947 at official level, and an understanding was reached between them, resulting in a crop of new Nationality Acts which betray important local variations but which nevertheless follow a general scheme.⁴ The first member to legislate was the United Kingdom, and the objects of the scheme were set out in the official summary of the main provisions of the British Bill:⁵

'A scheme of legislation which combines provisions defining the persons who are citizens of the several parts of the Commonwealth with provisions for maintaining the common status of British subjects throughout the Commonwealth has the advantage of giving a clear recognition to the separate identity of particular countries of the Commonwealth, of clarifying the position with regard to diplomatic protection, and of enabling a Government when making treaties with other countries to define with precision who are the persons belonging to its country and on whose behalf it is negotiating. Such a system also enables each country to make alterations in its nationality laws without having first, as under the common code system, to consult the other countries of the Commonwealth and to ascertain whether the alterations contemplated would impair the common status.

'The essential features of such a system are that each of the countries shall by its legislation determine who are its citizens, shall declare these citizens to be British subjects, and shall recognize as British subjects the citizens of other countries. For this last purpose there is need of a 'common clause', of which the substantial effect shall be the same in each country, to ensure that all persons recognized as British subjects in any part of the Commonwealth shall be so recognized throughout the Commonwealth. Clause 1 of the Bill, which is the key clause, has been agreed with all the countries named in it.'

¹ See s. 9 of the Act.

² See, for example, Section XIV of the Report of the Imperial Conference of 1937 (Cmd. 5482).

³ 10 Geo. VI, c. 15, amended in 14 Geo. VI, c. 29, in 1950.

⁴ British Nationality Act, 1948 (11 and 12 Geo. VI, c. 56); Australian Nationality and Citizenship Act, No. 3 of 1948, amended by No. 58 of 1950; South African Citizenship Act, No. 44 of 1949; British Nationality and New Zealand Citizenship Act, No. 15 of 1948; Pt. II of the Constitution of India, 1949; Ceylon Citizenship Act, No. 18 of 1948, amended by No. 40 of 1950; an Act to provide for Pakistan Citizenship, Constituent Assembly (Legislation) Act (No. 11 of 1951); Southern Rhodesian Citizenship and British Nationality Act, No. 13 of 1949.

⁵ Cmd. 7326.

The first section of the British Act—the 'key-clause'—is as follows:

'Every person who under this Act is a citizen of the United Kingdom and Colonies or who under any enactment for the time being in force in any country mentioned in subsection (3) of this section is a citizen of that country shall by virtue of that citizenship have the status of a British subject.'

The countries mentioned in subsection (3) are: Canada, Australia, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia, and Ceylon. It was the expectation that a similar clause would appear in the legislation of the other Commonwealth countries, and most of them have so provided.¹ In this way, the common status, whether the name be 'British subject' or 'Commonwealth citizen',² is to that extent preserved. As Dr. Mervyn Jones puts it:

'The scheme . . . is that each Commonwealth country will enact a citizenship law containing the principle enunciated in S. I (1) of the British Act, by which mutual recognition as British subjects will be given to the citizens of the other Commonwealth countries. When all these laws have been passed, British subjects, instead of being ascertained by reference to a common code, will simply be the sum-total of the citizens of all the Commonwealth countries.'³

The question with which we are concerned, then, is this: does this new kind of common status of British subject or Commonwealth citizen have any function in international law and relations; or is its operation confined within the limits of Commonwealth law?

International law assumes a dichotomy of status—alien and national. A person who is not a citizen of a State is in respect of that State an alien; and traditional international law is mainly concerned with the rights of aliens, for nationals enjoy the rights conferred upon them by municipal law. Into this simple situation the Commonwealth scheme introduces a third quantity. In the words of the British Nationality Act, 'alien' now means 'a person who is not a British subject, a British protected person or a citizen of Eire'.⁴ What is the position, then, within the Commonwealth of a person who is not a citizen nor yet an alien? In the present practice of nearly all Commonwealth countries he has very many privileges that the alien does not possess, the extent of them varying somewhat from one country to another; but in nearly all of them he may acquire citizenship as of right by the simple process of registration, and without the formalities

¹ Not, however, Ceylon, India, or the Union of South Africa.

² S. 1 (2) of the British Act.

³ In this *Year Book*, 25 (1948), pp. 160-1.

⁴ S. 32 (1). See also Canadian Citizenship Act, 1946, s. 2 (a): "'alien" means a person who is not a Canadian citizen, Commonwealth citizen, British subject or citizen of the Republic of Ireland.' The Australian Act, s. 5 (1), provides: "'alien" means a person who is not a British subject, an Irish citizen or a protected person'; the South African Citizenship Act, s. 1 (1), provides: "'alien" means a person who is not a South African citizen, a citizen of a Commonwealth country or a citizen of the Republic of Ireland'; the New Zealand Act, s. 2 (1), provides: "'alien" means a person who is not a British subject, a British protected person, or an Irish citizen.'

and delays of naturalization. In the United Kingdom, where his rights are largest, he is virtually in the same position as the citizen of the United Kingdom and Colonies, for he may come and go as he pleases, he will not be deported, he may vote, stand for Parliament, become a member of the Privy Council, or of the Civil Service, own a British ship, and so on. The privileges that the common status confers, then, are valuable privileges which make the position of the Commonwealth citizen akin to that of local national over something like a quarter of the area of the countries of the world. It is important to note, however, that these privileges which the Commonwealth citizen enjoys in a Commonwealth country not his own, exist only by virtue of the municipal law of that country. 'Let it be plainly understood', said the Lord Chancellor introducing the British Nationality Bill, 'that common nationality does not necessarily confer rights in other member States. . . . The mere fact that one possesses British nationality does not, and cannot in the nature of things, confer any rights in regard to any particular territory. All we can say is that, although there is no special treatment which necessarily follows throughout the Commonwealth, we hope and believe that, other things being equal, the fact that a man possesses British nationality will stand him in good stead in his application, whatever that application may be.'¹ In short, in regard to such matters as immigration, deportation, and the rest, the rights of the Commonwealth citizen, like those of the alien, may be more or less restricted by the municipal law. It is merely expected that the independent power of municipal legislation will not be used so as to place the Commonwealth citizen and the alien on all fours and so empty the common status of all content. This, of course, is the characteristic development pattern of the Commonwealth: sovereign independence tempered by more or less loosely defined understandings about the ways in which it may be exercised. Moreover, in so far as the 'common status' consists of privileges enjoyed by grace of municipal laws, it cannot be said to depend legally upon the common allegiance. There is no technical reason why similar reciprocal arrangements should not be made with a 'foreign' country; and, indeed, the arrangement does extend to Eire which, if she is not a foreign country, is also not a member of the Commonwealth.

Thus far, then, the common status would seem to be no more than a domestic arrangement of the States partaking in it. The question arises, however, whether this common status of Commonwealth citizenship is one which third States must recognize for any purpose. To put the question in more concrete form: would it be possible, in international law (leaving aside, for the moment, inter-Commonwealth conventions) for, say, the United Kingdom to extend its diplomatic protection to a citizen of

¹ See Mansergh, *op. cit.*, p. 970.

Australia on the ground that he is a British subject, and to bring an international claim on his behalf against a defendant third State?

At first sight it might seem that the answer would be that it may; and that in fact the common status of British subject is precisely that part of Commonwealth nationality that operates in international law, as opposed to the local citizenship which is to do merely with rights in the local municipal law. For it is trite doctrine that nationality has two aspects: the one concerned with the municipal law, and the other concerned with international law. In 'British protected persons' there is already a status in which the international aspect of British nationality appears to exist as it were in isolation, without a corresponding municipal status. If the international aspect can exist in isolation there appears to be no reason why it should not also exist as a common status dependent upon the possession of one or other peculiar municipal law citizenship. As Viscount Jowitt put it: 'citizenship is the species; nationality is the genus'. This answer is made the more attractive by the consideration that all British subjects owe allegiance to the King,¹ and it is in this direct and reciprocal relationship between King and subject that protection has always depended. For protection is the correlative of allegiance.

Nevertheless, to attempt to maintain this solution, however attractive, would be to ignore half a century of Commonwealth history. For while it is no doubt true that the one King protects all his subjects, that protection can only be exercised through the medium of a particular government, and it may only be exercised through the government of the country in which the subject concerned is a citizen. The reason is that nationality, and therefore protection, is not only complementary to allegiance; it is also (and this is particularly relevant to international law) complementary to jurisdiction. Nationality is in fact a claim to jurisdiction. The jurisdiction was finally apportioned, as it were, between the Dominions in the Statute of Westminster. It is not possible now to have it both ways.^{2, 3}

¹ Not, of course, Indian citizens.

² Cf. Latham, *loc. cit.*, pp. 593-4, where, discussing the former common code system obtaining in 1937, he says:

'The determination of the categories of persons to whom a diplomatic or consular representative of Great Britain or a Dominion will accord protection is as much a function of the municipal law of the member of the Commonwealth which he serves as the determination of privileged categories in internal affairs. Any doubt of the Dominion's competence in this respect springing from the alleged territorial limitation of Dominion legislative power has been removed by Section 3 of the Statute of Westminster. It is indeed difficult to think of any incident or consequence in municipal law of the status of British subject which is since the Statute of Westminster preserved from the control of the legislatures of the Dominions by imperial fundamental law.'

It is true that he immediately goes on to say that who may regulate the status of British subject in international law is quite another matter and one of extreme obscurity. But since international law relegates the conferment of nationality to the municipal law, the question, far from being obscure, would seem to have been answered in the passage just quoted.

³ Moreover, there is also the question of the passport. The Commonwealth member States

Third States, then, will regard a British subject as being a national of the State in which he is also a citizen. Such arrangements for common status and privileges as may be agreed upon from time to time between members of the Commonwealth are *res inter alios acta*. The absurdity of any other solution in international law becomes immediately apparent if the matter is considered in relation to such undertakings as the acceptance of the Optional Clause of the Statute of the International Court of Justice, or of an arbitration treaty. Suppose, for example, a third State had entered into an agreement with Canada to set up a claims commission: it cannot be supposed that a claim on behalf of a South African citizen could be foisted on the Commission's jurisdiction on the ground that he was a Commonwealth citizen.

It will be recalled, moreover, that some of the earliest tendencies to break away from the 1914 common code system were designed to meet difficulties met not in the municipal law but in the international law sphere. Thus, for example, the common status of British subject has always raised delicate questions in the interpretation of the Statute of the World Court, and in particular concerning the procedure for the election of Judges. Canada, as early as 1921, went so far as to pass special legislation to ensure that she could nominate Canadian citizens as candidates for election to the Court independently of the United Kingdom and other Dominions; though the action of other Dominions seemed to show that this could be done without special legislation.¹ Difficulties also arose under Article 10, which originally provided that 'in the event of more than one candidate of the same nationality being elected' the eldest should be considered elected. Again it was the Canadian delegate at the First Assembly who pointed out that this provision might give rise to 'the false interpretation that a Canadian could not sit in the Court at the same time as a Judge of the United Kingdom'. It was then amended to read, 'in the event of more than one national of the same member of the League, &c.' There remained, of course, the question whether, under Article 31, a Dominion had a right in a proper case to appoint a 'national' *ad hoc* Judge, even though there might already be a permanent British Judge from the United Kingdom or another Dominion on the bench. In 1929 Sir Cecil Hurst tried to persuade a committee of jurists

now each have their own passports, which describe their holders simply in terms of local citizenship. For example, a Canadian passport describes the holder as a 'Canadian citizen' and asks for his protection. It would seem reasonable to suppose that a third State in which he is travelling is entitled to take this document at its face value, and to assume that it is the Canadian Government alone with which it has to deal in relation to this person, and perhaps that the passport works an estoppel against any other interpretation. Admittedly, however, the situation is complicated by the fact that Commonwealth citizens are in general also entitled to British passports and that many of them carry them.

¹ See Noel-Baker, *op. cit.*, pp. 102 ff. See also Pollack in *American Journal of International Law*, 20 (1926), p. 714.

that the Statute ought to be interpreted so as to permit this, for, he argued, an English Judge could not adequately represent the legal system of a Dominion, which might be quite different from English law. As the putting of this argument coincided with the decision to reserve *inter se* disputes on the ground that they were not international but domestic, it is not surprising that the other members of the Committee strained at the camel, and the proposal was defeated.¹

However, in the drafting of the Statute of the International Court of Justice, the independent members of the Commonwealth seem to have had their way on all points. Paragraph 2 of Article 3, based on an Australian proposal at San Francisco, provides that:

'A person who for the purposes of membership in the Court could be regarded as a national of more than one State shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights.'

This, of course, was before the new Commonwealth nationality legislation; but it anticipates it, in making quite clear that citizenship is the master rule for all purposes of the Statute: nomination and election of Judges, and appointment of Judges *ad hoc*. Moreover, in this connexion it must now be remembered that the Court may become seized of a dispute between two members of the Commonwealth.

It seems, therefore, that in general it is the local citizenship that counts as nationality in the international law sense; but this solution produces problems of its own, and there remain many questions to which no answer can yet be given with any assurance. For example, in most of the Commonwealth countries it is possible for a Commonwealth citizen to obtain the local citizenship merely by registration; and it is evidently thought desirable that Commonwealth citizens should be able to move easily from one citizenship into another. Nor do they necessarily lose the old one. As Dr. Mervyn Jones says: 'The possibility of dual citizenship within the Commonwealth was clearly contemplated and accepted.'² The question immediately arises whether such a change of citizenship would be a change of nationality within the meaning of the traditional rule of the nationality of claims. Suppose, for example, that an Australian citizen who was injured in a third State registered as a South African citizen before the claim was presented to a claims tribunal. Is it a possible consequence of this change that neither Government may now be competent to prosecute the claim against the third State? Here, of course, the scheme of easy duality of nationality assists, for provided the original citizenship is retained the original Government must remain competent. If, however, the original citizenship is lost, it would seem that the claim would fail to satisfy the rule

¹ *Pace* Noel-Baker, *op. cit.*, which was written before this decision.

² *Loc. cit.*, p. 169. On problems of dual nationality within the Commonwealth see Mr. Clive Parry's article on pp. 244-92 of this volume of the *Year Book*.

of nationality of claims. The matter can be stated as a dilemma. Either it must be accepted that it is a matter of indifference which Government prosecutes the claim, the individual having a nationality common to both (a solution already rejected), or the change of citizenship must be accepted as offending against the nationality of claims rule. Reason recoils from the suggestion that a change of citizenship of this kind may deprive of his remedy a person who is throughout a British subject; but then it must be remembered that this part of the rule of nationality of claims frequently offends both reason and morality, and that a *reductio ad absurdum* is almost an indication that it has been correctly applied. The solution is to be found rather in the modification of the rule.

The rule of the nationality of claims also provides that the individual claimant is non-suited if at any material time he has enjoyed the nationality of the defendant State. What is the effect of this part of the rule in *inter se* relationships? Does the common enjoyment of the status of British subject preclude all such claims *inter se*? Of course, according to the *inter se* doctrine the answer is clear enough, for it denies the premise: such international claims are not possible because they are *inter se*. Suppose, however, that such a claim were in fact brought before an international tribunal applying international law—and such a conjecture is by no means fanciful. Obviously the *inter se* doctrine as such could not be heard in an international court. That, however, is not the end of the matter, for the interesting question now arises whether, by the Commonwealth countries' acceptance of the common status of British subject, the *inter se* doctrine has for this particular purpose been put into a form which is serviceable at international law. Can the nationality of claims rule be called in aid to provide a direct international law sanction for this particular application of the *inter se* doctrine? It may be unwise to attempt to prophesy what answer an international court would give to a defence along these lines; but it is not by any means out of the question that here the *inter se* doctrine and international law would be found to give the same answer.

One further point arises out of this hypothetical claim for denial of justice between one Commonwealth country and another. At first sight it might appear that, apart from these questions of procedure and capacity, the case fails because there is no substantive international law that can be applied: for international law is concerned only with the treatment of *aliens*, while citizenship of any part of the Commonwealth and alienage are by definition mutually exclusive terms. This argument, however, contains a fallacy. The persons whom international law protects are those who are not nationals of the defendant State; and since in the normal situation these persons are necessarily aliens—for a man must be one or the other—international law speaks always of the protection of aliens. But the Commonwealth

legislation has introduced a *tertium quid*, with the result that the answer in terms of alienage is no longer necessarily valid. This is easily demonstrated by taking the case of the Republic of Ireland. Ireland is not a member of the Commonwealth, nor are her citizens Commonwealth nationals. Nor yet again are they aliens in any of the Commonwealth countries. It cannot be supposed that the result is that Ireland is incompetent to exercise diplomatic protection over her citizens in Commonwealth member States. The matter not being internal to the Commonwealth, she is not caught by the rule of nationality of claims, for indeed her citizens do not share the common status of British subject, though they partake of some of its privileges. The claim would therefore be viable because, although the citizen of Ireland is not an alien in the defendant country, he is a national of the plaintiff State and he is not a national of the defendant State; and that is precisely the person whom international law protects. Ireland in fact does get it both ways. The position of India *vis-à-vis* other members of the Commonwealth is tantalizing, and it is easier to raise the question than to solve it; but here again it would seem that a claim for denial of justice would be viable at international law, because the common allegiance is not shared. To put it another way, India has put herself into a position where the relevant aspect of the *inter se* doctrine is not serviceable at international law.¹

Another function of nationality in international law is in the definition of treaty rights. The new legislation will enable the various Commonwealth countries when making new treaties in the future 'to define with precision who are the persons belonging to its country and on whose behalf it is negotiating'.² This indeed is not so much a question of nationality as of the interpretation of treaties. Nevertheless, difficult questions are bound to arise in the interpretation of old treaties still in force in which benefits were promised to 'British subjects'.³ These treaties were many of them concluded for the British Empire at a time when there was undoubtedly and for all purposes a single nationality throughout the Empire. Does it now include all those citizens of independent Commonwealth countries who also share the common designation of 'British subject'? For the best part of a century it has been usual to insert clauses in British treaties defining, or providing for the definition of, the British territories to which the treaty applies.⁴

¹ The dispute about the treatment of Indians in South Africa is not relevant, for that is concerned with persons of Indian *race* who are for the most part citizens of South Africa, and most of whom do not have Indian nationality.

² Cmd. 7326. See above, p. 341.

³ E.g., Treaty of 1903 between the United Kingdom and Persia (relied on by the United Kingdom in the *Anglo-Iranian Oil Company* case) which provided: 'il est formellement stipulé que les sujets et les importations Britanniques en Perse, ainsi que les sujets Persans et les importations Persanes dans l'Empire Britannique, continueront à jouir sous tous les rapports du régime de la nation la plus favorisée.' (*British and Foreign State Papers*, vol. 96, p. 51.)

⁴ See Stewart, *op. cit.*, Chapter IV.

Does the territorial definition now raise a corresponding limitation in terms of nationality? It would be foolish to attempt any general answer. Obviously, each treaty requires separate consideration. But it is clear that the new nationality laws will raise some new problems of definition as well as answering old ones.

Finally, there is the question of war and neutrality; for it now has to be accepted that one part of the Commonwealth may be neutral whilst another is belligerent. Which test should a belligerent apply, for example, to decide whether or not a Commonwealth citizen is an enemy alien? The difficulty was foreseen by Latham even under the old common code system:

‘The real juristic difficulty in regarding the Commonwealth as divisible in matters of peace and war lies not in any supposed indivisibility of the Crown in this respect—for the Crown, like any other fictitious entity, exists only to have arbitrary meanings given to it—but in the extreme difficulty of distinguishing in such matters between the nationals of one member of the Commonwealth and those of another, so long as and to the extent that the status of British subject is for these purposes the common nationality of the citizens of all members of the Commonwealth.’¹

Since the new scheme came into operation this juristic difficulty is much less, if indeed it has not disappeared altogether, for it is now questionable whether the status of British subject is a ‘common nationality’ in the international law sense. It would seem that the result that local citizenship is decisive for these purposes is a concomitant of the destruction of the former legal necessity for Commonwealth unity in questions of war and peace. The two ride together.

VI. *Conclusions*

It must be apparent from even a glance at modern Commonwealth relations that the old and strict version of the *inter se* doctrine, by which it was denied that international law could ever apply between members of the Commonwealth, has long been untenable. It is no great loss, for it always had something of an air of unreality. It was a juristic periphrasis for a denial of what had in fact happened; an attempt to retain the shadow having conceded the substance.

It would be a mistake, however, to assume that the *inter se* doctrine may be entirely discarded, or that there is no remaining problem. As long as the Commonwealth association remains in being, there must be some aspects of *inter se* relationships which are governed not by international law but by the conventions of the Commonwealth; and it seems that the relation of these conventions with international law are of three kinds.

First, there are those matters dealt with in section I above, where the Commonwealth rule is either the same as the international rule or the difference is of little importance. Here there would seem to be neither

¹ Latham, loc. cit., pp. 587-8.

virtue nor profit in pretending to any difference of kind between international and *inter se* law. It is obvious that in these matters the international rule has to all intents and purposes been accepted, and any differences peculiar to the Commonwealth are easily comprehended within the international system.

Secondly, there is the more difficult case of the conventions which are at variance with the international law rule, and which in some cases actually contradict it, so that the two cannot live together. For example, the old convention that *inter se* disputes may not be submitted to international tribunals; or the obsolete convention that international law can never apply to *inter se* relations; or the rule which may or may not be obsolete that the Crown cannot be at peace and war at the same time. The difficulty here, of course, is that if these conventions are at any point permitted in fact to come into conflict with international law, the international law rule will always prevail. The situation is entirely different from that which prevails in English constitutional law, where the law is fashioned by convention and where, for historical reasons, the convention commonly prevails over the law. In international law, which can know nothing of the esoteric conventions of the Commonwealth, the law must prevail and the conventions go to the wall. Thus, each time one of these conventions is, so to speak, brought out into the open by a challenge from one of the Commonwealth countries and tested at international law, the convention tends to be destroyed; and of course this has frequently happened, for the development of the Dominions towards independence is nothing more than a development towards personality in international law, and it is natural that conventions of co-operation should therefore be open to the danger of challenge in terms of international law. Whenever the Dominions have in any particular matter demanded the form as well as the substance of their independence they must perforce be allowed it. Thus the rule of international law tends to come in in place of the convention and to augment the group of matters where international law has been received. It is difficult to halt this process, for once the major premise of the *inter se* doctrine—that international law can never apply *inter se*—has had to be modified, then international law having been allowed in tends gradually to overwhelm convention by a process of erosion; so that many things that were formerly thought to be indispensable links of Empire have had to be discarded with the rest.¹ Whether a line can be drawn, and where, is not a legal but a political question.

¹ Thus Smith (in *International Law Quarterly*, 2 (1953), p. 263): 'What has been asserted to be legally impossible has in fact occurred with a disconcerting frequency. The books had to be rewritten, the statements of principle expressed more tentatively and with a diminishing confidence that they will not soon be whittled down by exceptions until the exceptions become recognized as the true rule.'

Thirdly, however, it will have been noticed that there are some conventions which are not irreconcilable with international law. Examples would be the *inter se* doctrine applied to agreements and understandings in so far as the doctrine may be expressed in terms of intention not to contract obligations binding at international law; and possibly some aspects of the common status retained in the new nationality laws. This kind of convention is clearly the strongest because, far from being at variance with international law, it is sanctioned by it.

Without question it must now be acknowledged that international law must play a major part in *inter se* relationships, and it would be wise therefore as far as possible to express the conventions of the Commonwealth in terms that make them complementary to international law rather than at variance with it. This is desirable, for it must not be imagined that because international law has so often been the stronger law it is necessarily a superior law. On the contrary, in many ways the Commonwealth system is superior; for example, in its use of the symbol of the Crown as a unifying force between sovereign States the Commonwealth has retained a true community and has solved a vital psychological problem which international lawyers have scarcely begun as yet to comprehend. On the other side of the picture, the gain to international law itself by the realization and acknowledgement of the important part it plays in the Commonwealth association cannot but be considerable.

THE REQUIREMENT OF RATIFICATION¹

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Introduction

THE purpose of this article is to consider the function of ratification in the modern practice of States, in particular by reference to the question when and whether ratification is required in order to bring a treaty into force. This second question requires some preliminary explanation. States are free to choose for themselves the procedure for the entry into force of a compact between them.² Thus, there is no doubt that if an international agreement expressly stipulates for entry into force by signature or ratification or some other manner, the prescribed procedure must be complied with. Nor, again, is there any doubt that in cases where it is clearly implied that the parties intended to use some particular procedure to bring a treaty into force, such implication is no less decisive than an express provision. In most modern treaties it is either expressly stated or clearly implied by what procedure they are to come into force.³ However, a relatively small number of treaties do not contain such express provisions or clear implications.⁴ What is the rule to be applied in these residuary cases? Is it the rule that all treaties require ratification unless this is expressly or impliedly dispensed with? Or that treaties enter into force upon signature unless ratification or some other procedure is expressly or impliedly provided for? An attempt will be made to answer these questions in the following pages.

By ratification is here meant the procedure whereby the executive power of a State—traditionally the Head of State—signifies its final consent to an agreement. This act is sometimes called ratification in the 'international sense', as contrasted with ratification in the 'constitutional sense' which is usually approval of a treaty by the legislative body of a State.⁵ In the present article the more convenient terms 'international ratification' and 'constitutional ratification' will be used.

The definition of international ratification varies slightly from authority to authority, but on the whole it seems to be agreed that ratification normally is a written document, expressing a State's final consent⁶ to a

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² See *infra*, p. 359.

³ See *infra*, pp. 359 and 360.

⁴ See *infra*, p. 360.

⁵ This distinction is made by Sir Gerald Fitzmaurice in his article 'Do Treaties Need Ratification?', in this *Year Book*, 15 (1934), pp. 113-14.

⁶ Some writers characterize ratification as a 'confirmation' rather than a consent; see, for

treaty, signed by the authority designated thereto by the internal order of the State, usually the Head of State, the Prime Minister, the Foreign Minister, or possibly some other high State official.¹ It often contains the text of the compact which is ratified. It is generally agreed that the instruments of ratification have a formal character, and that there is usually a certain solemnity about the instruments and about the exchange of instruments.²

I. *The character and purpose of the procedure of ratification*

In order to create a binding agreement, *consensus*³ between parties is necessary. Two questions immediately arise:⁴ who is, according to international law, competent to express the consent of a State to a treaty; and, having found the competent organ, in what way is it to express the consent of the State to a treaty? In short, what are demanded or accepted by international law as the criteria of consensus? To clarify both questions a brief historical outline may be useful.⁵

It is not surprising that States, in dealing with each other, have sought to negotiate with and to obtain the promise of the organ which was in fact

example, Oppenheim, *International Law*, vol. i (7th ed. by Lauterpacht, 1948), pp. 813-14 and footnotes therein. Anzilotti, however, stresses that ratification is not 'un acte confirmatif, mais la véritable déclaration de volonté de stipuler; il ne valide pas un acte déjà existant, mais il donne existence à un acte nouveau' (*Cours de droit international* (1929), p. 370). Dr. Mervyn Jones explains that ratification is now regarded as the formal acceptance of a treaty: 'It means the ratification of the treaty itself. Formerly it meant the ratification of the act of an agent in signing it' (*Full Powers and Ratification* (1946), p. 87).

¹ As in the case of the Soviet Union and Switzerland, a collective organ may be vested with the treaty-making power of the State, and therefore be the competent authority to ratify. However, the instruments of ratification will be signed on behalf of such authority by some particular person(s). See Rousseau, *Principes généraux du droit international public*, vol. i (1944), p. 197; Bittner, *Die Lehre von den völkerrechtlichen Vertragsurkunden* (1924), pp. 23-24; Depuis, 'Liberté des voies de communication et les relations internationales', in Hague Academy, *Recueil des Cours*, 1924 (i), p. 288.

No instance is known where an international organization has designated its final approval of a treaty as a ratification: see *infra*, p. 364.

² The Tsar of Russia, for instance, used to present to the foreign representative who handed over the instrument of ratification a snuff box, the material of which varied in value in relation to the dignity of the foreign representative. See Moore, *A Digest of International Law*, vol. v (1906), § 741, p. 182. A somewhat more restricted solemnity may be seen in the beautiful leather covers which often enclose the instruments of ratification.

³ Strictly speaking it is, of course, an *expression* of consensus that is necessary. Oppenheim (op. cit., p. 813) speaks of the mutual consent being 'manifest'. See also the Dissenting Opinion of Judge Basdevant in the *Ambatielos Case* (Jurisdiction): *I.C.J. Reports*, 1952, p. 69; and see Anzilotti, op. cit., pp. 342-3.

It is impractical to base a rule on the 'will' of a State unless there is a corollary rule, establishing the objective criteria which shall be deemed to express or imply this will. Consequently, a consensus capable of juridical effects is created not by any intangible wills of States, but by some facts, some criteria which are not infallible but generally are deemed to express the wills of States.

⁴ See Bittner, op. cit., p. 7.

⁵ For a more extensive account of the historical aspect see Jones, op. cit.; Camara, *The Ratification of International Treaties* (1949); Dehousse, *La Ratification des traités* (1935), pp. 83 ff.; Bittner, op. cit., Introduction.

capable of carrying out the obligations which it has undertaken. In States ruled by a sovereign monarch, this organ was undoubtedly the monarch himself, and we find accordingly that the whole treaty-making power lay in his hands.¹ After the French revolution, in a great number of States the sovereigns or the Executives had to yield some of their powers to a Legislature or Parliament. In such States it might happen that one obligation undertaken by that State towards another State could only be carried out with the consent of the Legislature, while a different obligation might well be within the sole power of the Executive. Decisive in this regard, of course, is the division of powers within the State.² While a division of powers became typical of constitutional law in modern States, international law was not easily adapted to this new structure. Possibly this was so partly because of the difficulty of finding a uniform rule of international law suited to the division of powers in all States; partly because the old rule that the supreme power over the international relations of a State is vested in the Head of State—and in him alone—was a very simple and clear one,³ even if it no longer corresponded with the political and constitutional realities in many States.

It is only during the twentieth century that it has been more widely acknowledged⁴ that under international law the approval of a treaty by the Legislature of a State may be required to render the treaty valid, and even today this is doubted by some.⁵ Similarly, it is only during the present century that the conclusion of treaties directly between government departments has become a common and accepted practice.⁶ There has thus been a decentralization of the treaty-making power in many States. This decentralization has also, broadly speaking, been recognized in international law, and various organs of States are consequently considered as competent to express the consent of their States.

An historical survey of the procedure whereby the competent organ of a State expresses the State's consent to treaties reveals that this procedure has undergone considerable modifications from Grotius's time to ours. For the purpose of conclusion of treaties through agents, the sovereigns of the seventeenth century issued Full Powers conferring upon these plenipotentiaries the competence to act as if they had been sovereigns themselves. It is true that the treaties had to be ratified subsequently by the sovereigns,

¹ See Bittner, *op. cit.*, pp. 16–20.

² See the discussion in the International Law Commission on 22 June 1950: U.N. Doc. A/CN.4/SR.52, p. 24. See also Jones, *op. cit.*, p. 32.

³ See Genet, 'La Clause tacite de ratification', in *Revue générale de droit international public*, 38 (1931), p. 764, and the same, *Traité de diplomatie et de droit diplomatique*, vol. iii (1932), p. 360.

⁴ See, for instance, Article 21 of the Harvard Draft Convention on the Law of Treaties, printed in *American Journal of International Law*, 29 (1935), Suppl., p. 992.

⁵ See, for example, Fitzmaurice, *loc. cit.*, p. 134.

⁶ See Jones, *op. cit.*, p. 61.

but regularly the Full Powers contained promises to ratify, and a sovereign was considered to be under an obligation to proceed to ratification except when his plenipotentiary had exceeded the authority in the Full Power. Thus, if a plenipotentiary had acted *within* the authority conferred upon him by the terms of his Full Power, his State's consent to the treaty he had negotiated was deemed to be expressed by his signature, and the subsequent ratification regarded only as a confirmation of the fact that he had not exceeded the authority of his Full Power. It followed that the ratification had retroactive effect: once it had been ratified the treaty became binding as from the date of signature.¹ When ratifications were refused, disputes frequently arose whether the agent had exceeded his authority or not. By the end of the eighteenth century this pattern was modified. Full Powers were still issued by Heads of States, often including the traditional promises concerning subsequent ratification: but these promises were little more than empty phrases. In practice, Heads of States felt at liberty to refuse ratification, even if their agents had not exceeded their Full Powers or instructions. Definite expressions of consent were consequently not given before ratification. A State became bound by a treaty only when the Head of State had ratified it and after the exchange of instruments of ratification had taken place. It is now generally accepted (*a*) that if a compact requires ratification, this implies (in the absence of any provision to the contrary) that the States become bound by that compact at the moment when the exchange of the instruments of ratification takes place, and (*b*) that there is no duty to ratify a signed treaty, even if a Full Power has been issued which seems to create such an obligation, or a treaty expressly provides that it 'shall be ratified'.²

What particular purposes does the procedure of ratification fulfil today? One of the arguments for the 'right to ratify' has often been that the conclusion of a treaty is a matter so important that a State should not be exposed to possible errors of its plenipotentiaries.³ The procedure of ratification offered an adequate safeguard against this.⁴ This argument was no doubt of great importance at a time when the negotiating agents of a State

¹ For a detailed account on this point see Jones, *op. cit.*, pp. 65-68.

² The evolution leading to the now established rule that ratification does not operate retroactively is described by Jones, *op. cit.*, pp. 92-106. And see Harvard Research in International Law, in *American Journal of International Law*, 29 (1935), Suppl., pp. 799-812.

³ See, for example, Rousseau, *op. cit.*, p. 190.

⁴ Dr. Jones points out that 'at a time when the discretion to ratify was not yet established as a rule of law, the argument that an agent had exceeded his instructions was a convenient one. It was a recognised ground for refusing to ratify. . . . When it came to be recognised that ratification was discretionary . . . the importance of excess of instructions, from a legal point of view, correspondingly diminished' (*op. cit.*, p. 39). Cf. Basdevant's view that it was difficult, under the agent theory, to establish what an agent was empowered to by his Full Power, and that this difficulty has been avoided by the rule which lays down the necessity of ratification. ('La Conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités', in *Hague Academy, Recueil des Cours*, 5 (1926), p. 575.)

were not in a position to receive continuous instructions by code telegrams. When their drafting power had to be fairly large, it was reasonable that they should not have competence to bind the State.¹

However, for most modern compacts the argument is probably of small importance. It is believed that negotiators are nowadays frequently very restricted in their liberty to draft. An important question which comes up during the negotiations may not be settled until the plenipotentiaries have received precise instructions from their Governments, despite the fact that their Full Powers may seem to enable them to decide the question themselves. It might perhaps sometimes even be said that the plenipotentiaries are merely 'voicing' the instructions they receive continuously from their Foreign Offices.² The risk to which a State exposes itself of errors by its agents can be almost, though not completely, neglected when these agents are acting upon frequent and precise instructions. It is not surprising, in the circumstances, to find that most contemporary writers do not emphasize, as an important purpose of the procedure of ratification, its function of safeguarding against errors of the negotiators.³ In contemporary international relations the following are believed to be the main purposes of ratification.

(1) Parties to international compacts must know when they become irrevocably bound by the compacts. The acts which are deemed to express the consensus between the parties should, for this reason, be in a form which is very easily apprehended by all concerned. This object is well served by the formal character of the instruments of ratification, by the solemnity (and sometimes publicity) of the exchange of the instruments, and by the possibility of fixing the very moment when this exchange takes place.

(2) There is nothing to prevent States from ratifying a treaty on the day on which it is signed. However, usually there is a certain interval between the signature of the treaty and the exchange of the instruments of ratification. It is this interval which is often referred to as the primary purpose of the procedure of ratification. It enables the competent executive authorities of the States to undertake a 'fresh examination'⁴ of a treaty, to receive the advice of government departments and others concerned, and, what is most important, to submit the treaty to the Legislature for approval, if this be required under the constitutional law or practice of the State.

¹ See Bittner, *op. cit.*, p. 47.

² *Ibid.*, p. 138.

³ Genet maintains that a plenipotentiary nowadays is in all respects qualified to conclude a treaty which becomes binding upon his signature, but still explains the purpose of the procedure of ratification to be a 'contrôle de conformité', i.e. a control that a negotiator has not deviated from his Full Powers and instructions: 'La Clause tacite de ratification', in *Revue générale de droit international public*, 38 (1931), p. 758. This view has been criticized by Jones, *op. cit.*, p. 32.

⁴ See Work of the Committee appointed to consider the question of ratification and signature of conventions concluded under the auspices of the League of Nations: League of Nations, *Official Journal*, 1930, p. 599.

(3) The very solemnity of the procedure of ratification is an end in itself. In past centuries, when the conclusion of treaties was not so common as it is today, such solemnity was particularly conspicuous. The preambles of treaties no longer invoke 'The Holy and Indivisible Trinity' or 'Almighty God';¹ however, they still often serve to express the awareness of the parties that a treaty is a solemn undertaking which is to be honoured. The same applies even more strongly to the instruments of ratification and the exchange of these instruments. Though cases may be found where these instruments are very simple in form,² and though the practice seems to be rapidly spreading of exchanging simple notes of approval³ instead of instruments of ratification, a certain solemnity is still very common in the procedure of ratification and may be intended to reflect the serious intentions of the parties to honour the agreement.⁴

II. *The various modes of bringing treaties into force*

We have been concerned so far with the traditional procedure for bringing treaties into force, namely, ratification following signature. However, when we turn to the actual practice of States we find that the procedures used for bringing them into force are extremely varied.⁵ Thus, in bilateral treaties, besides the traditional procedure where both parties sign and ratify a treaty, there are also numerous cases of treaties being validly concluded where both parties sign and neither ratifies, or where one party signs and the other party signs *and* ratifies.⁶ The consensus between the parties to a draft agreement may also be established and evidenced by proclamations,⁷ by

¹ For an interesting historical account of the solemnity adopted in the conclusion of treaties see Bittner, *op. cit.*, pp. 269 ff. ² For examples see Camara, *op. cit.*, p. 143.

³ See *infra*, pp. 363 ff.

⁴ *Ibid.*

⁵ For an account of various procedures used in modern practice to bring treaties into force see Parry, 'Multipartite Treaties', in *Transactions of the Grotius Society*, 36 (1950), pp. 154 ff.; and *Manual on Final Clauses*, U.N. Doc. ST/LEG. 1.

⁶ For examples see Jones, *op. cit.*, p. 119, and Harvard Research in International Law, in *American Journal of International Law*, 29 (1935), Suppl., p. 759. Numerous treaties expressly providing for this manner of entry into force are reproduced in the *United Nations Treaty Series*. Thus the Agreement of 29 June 1948 between Denmark and the United States of America concerning Economic Co-operation provides in Article XII that:

'This agreement shall be subject to ratification in Denmark. It shall come into force on the day on which notice of such ratification is given to the government of the United States of America.' (U.N.T.S. 22 (1948), p. 217.)

For similar instances see Agreement of 17 April 1947 between the Netherlands and Greece concerning Air Transport (*ibid.* 32 (1949), p. 115); and Financial Agreement of 9 April 1946 between Canada and France (*ibid.* 43 (1949), p. 43).

⁷ In the Agreement of 4 July 1946 between the Philippines and the United States of America concerning Trade and related matters during a transitional period following the institution of Philippine independence, Article X provides:

'... This Agreement shall then be proclaimed by the President of the United States and by the President of the Philippines, and shall enter into force on the day following the date of such proclamations, or, if they are issued on different days, on the day following the latter in date.' (U.N.T.S. 43 (1949), p. 156.)

For a similar provision see Article XVIII of the Agreement of 23 December 1942 between the United States of America and Mexico concerning reciprocal trade (*ibid.* 13 (1948), p. 248).

publication,¹ by an exchange of telegrams,² or of notes;³ while a mere exchange of notes which are not even signed may be intended to constitute a treaty, the very *exchange* of the notes establishing and evidencing the consensus between the parties.⁴

In multilateral treaties, the consensus between the parties may be established and expressed by the traditional procedure of deposits of instruments of ratification following signature. But it may equally well be evidenced simply by deposits of instruments of ratification⁵ (without preceding signatures), or merely by signatures⁶ (without subsequent ratification), or merely by signatures for some parties and ratifications following signatures for others⁷ (each according to his choice). The procedures of accessions and acceptance,⁸ which are outside the province of this article, may also be mentioned. Finally, a small number of treaties expressly provide for entry into force by signature *and* for subsequent ratification.⁹

There is no doubt that the many varying procedures used with the intention of bringing treaties into force, when provided for and complied

¹ In the Arrangement of 25 February 1949 between Belgium and Luxembourg concerning the reciprocal communication free of charge of copies of civil status certificates and nationality records, Article 5 provides:

'This Arrangement is not subject to ratification. It shall come into force when each of the two Parties has approved and published it in accordance with its domestic law. . . .' (*U.N.T.S.* 47 (1950), p. 7.)

Similar, but more ambiguous, provisions are to be found in an exchange of notes between Belgium and Spain constituting an Agreement modifying Article 15 of the Convention of 17 June 1870 between Belgium and Spain to ensure the punishment of crimes and offences. The exchange of notes took place on 24 January 1947 (*ibid.* 19 (1948), p. 6).

² In the Provisional Agreement between the Governments of Pakistan and Ethiopia relating to Air Services, signed on 1 December 1948, the Preamble provides that:

'This provisional agreement too, is subject to ratification by both the Governments which will be effected by exchange of telegrams.' (*U.N.T.S.* 35 (1949), p. 4.)

An Agreement of 2 November 1939 between the Governor-General of French Equatorial Africa and the Governor-General of the Anglo-Egyptian Sudan concerning Radiotelegraphic Communication contains the following provision (Article 6) regarding its entry into force:

'The present agreement will come into force from the fifteenth of October, 1939, after accord established by radiogram between the two Contracting Parties, which will sign and affix their seals, subsequently, on the agreement written in English and French respectively. . . .' (*Ibid.* 2 (1947), p. 212.)

³ See *infra*, pp. 363 ff.

⁴ E.g., Exchange of Letters of 17 October and 18 November 1947 between Pakistan and Burma, constituting an agreement regarding the operation of air services (*U.N.T.S.* 35 (1949), p. 323). See Weinstein, 'Exchanges of Notes', in this *Year Book*, 29 (1952), p. 206.

⁵ E.g., conventions concluded under the auspices of the International Labour Organization.

⁶ For examples of some importance of this kind of treaty see Weinstein, *loc. cit.*, p. 225.

⁷ E.g., Protocol to prolong the International Sanitary Convention for Aerial Navigation, 1944, modifying the International Sanitary Convention of 12 April 1933, opened for signature at Washington on 23 April 1946. Article IV of this Protocol provides that:

'The present Protocol shall come into force when it has been signed without reservation in regard to ratification, or instruments of ratification have been deposited or notifications of accession have been received on behalf of at least ten Governments. . . .' (*U.N.T.S.* 16 (1948), p. 179.)

⁸ See Liang, 'Notes on Legal Questions concerning the United Nations', in *American Journal of International Law*, 44 (1950), pp. 342-9; Saba in *Revue générale de droit international public*, 54 (1950), pp. 417-32; and Parry, *loc. cit.*, pp. 167 ff.

⁹ See *infra*, p. 363.

with, establish compacts which are juridically binding. In consequence, a first rule can be deduced regarding the entry into force of treaties, namely, that the parties to a treaty are free to agree on any manner in which the consensus between them may be established and expressed. This rule, it is believed, is universally recognized.¹ However, the question arises what is to be deemed sufficient evidence of agreement between the parties on the manner in which the treaty is to enter into force? It cannot be doubted that a clearly implied agreement between the parties in this respect is as decisive as an express clause to the same effect. Thus, for example, if a signed treaty contains no clause as to its entry into force, but one party has communicated a Full Power in which subsequent ratification is reserved (or promised), it must be deemed to be clearly implied that this party intended to be bound only by ratification. It may also be arguable that it is implied that a treaty shall enter into force by signature—or at least *not* by ratification—if its final clauses provide for entry into force on some specified *date*, without mentioning by what means the consensus between the parties shall be expressed.²

It is convenient at this stage to examine representative examples of modern treaties in order to ascertain how common are such express clauses or clear implications in the texts of treaties. An analysis of some 1,300 instruments reproduced in the *United Nations Treaty Series* (vol. 1 (1946)–vol. 79 (1951)) provides instructive material on the subject. Out of some 1,300 instruments:

- (a) some 300 expressly or by clear implication provide for ratification;
- (b) some 425 expressly or by clear implication provide for entry into

¹ Mr. Parry, recognizing the importance of some uniformity in the practice of treaty-making, somewhat regretfully finds that the parties may 'within very wide limits . . . stipulate exactly what they wish', and that 'the result is that anarchy may easily prevail' (loc. cit., p. 183). Genet, on the other hand, finds the possibility of variety an advantage (*Traité de diplomatie et de droit diplomatique*, vol. iii (1932), p. 477).

² See paragraph 2 (a) of Article 6 in Professor Lauterpacht's *Report on the Law of Treaties* submitted to the International Law Commission on 24 March 1953: U.N. Doc. A/CN.4/63, p. 67.

The Technical Agreement of 24 March 1947 between Belgium and Poland on co-operation between social insurance organizations provides in its final clause: 'The present agreement shall enter into force on 1 April 1947.' (*U.N.T.S.* 18 (1948), p. 295.) Nothing in the Agreement suggests that ratification or any other procedure of approval is required. It seems reasonable to assume that the phrase 'enter into force' is here actually intended to signify that the Agreement becomes *operative* on the specified date, and that it is implied that the Agreement becomes *irrevocable* by signature. Numerous treaties have clauses of this type. A Financial Agreement of 5 February 1946 between the Government of Canada and the Government of the Netherlands contains the following final clause, which might also be deemed to imply clearly that the Agreement entered into force by signature:

'11. The agreement dated 1st May, 1945, between the parties hereto is hereby cancelled as of the date of this agreement and shall be deemed to be replaced by this agreement.' (*U.N.T.S.* 43 (1949), p. 10.)

A footnote to the text of the Treaty reproduced in the *United Nations Treaty Series* informs us that the Agreement came into force by signature.

force by signature. A very small number of these—5 treaties—expressly dispense with ratification in terms such as ‘the present agreement is not subject to ratification and shall come into force immediately upon being signed’;¹

- (c) some 250 exchanges of notes (out of some 375) expressly or by clear implication state the manner in which they are to come into force, normally by the very exchange of signed notes; only a very small number of exchanges of notes provide for ratification (these are included above, under (a));²
- (d) some 90 expressly provide for entry into force upon ‘approval’, evidenced, for instance, by an exchange of notes;³
- (e) some 60 contain express provisions or clear implications with regard to the manner in which they are to come into force, but cannot easily be classified within any of the above groups.

Thus in at least 1,125 treaties (out of 1,300) the manner by which they were to come into force was expressly laid down or clearly implied in the texts of the treaties. There remain some 125 exchanges of notes and some 50 other instruments in which neither express clauses nor clear implications indicate the procedures whereby these instruments were to enter into force.⁴

¹ See, for example, Article XII of the General Armistice Agreement of 24 February 1949 between Israel and Egypt (*U.N.T.S.* 42 (1949), p. 268).

² See Weinstein, loc. cit., p. 224.

³ See *infra*, pp. 363 ff.

⁴ Of these 175 treaties all but one actually came into force otherwise than by ratification: see *infra*, pp. 366 ff.

It is sometimes difficult to distinguish between ‘express provision’ and ‘clear implications’. Throughout this article both refer to the unambiguous intention of the parties concerning the mode of entry into force of a treaty. Thus an express provision for ratification may read: ‘The present treaty enters into force upon the exchange of instruments of ratification. . . .’ A clear implication may be: ‘The present Convention . . . may be denounced from year to year as from the date of the exchange of ratifications’ (Convention of 9 January 1947 between Belgium and France, concerning the nationality of married women: *U.N.T.S.* 36 (1949), p. 145). Similarly, there is a clear implication that ratification is required in the Belgian declaration of 10 June 1948, recognizing as compulsory the jurisdiction of the Court, in conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice. The declaration applies to any legal dispute ‘which may arise after the ratification of this Declaration concerning any situation or fact arising after such ratification . . .’ (*ibid.* 16 (1948), p. 203). Entry into force by signature is frequently implied by a clause laying down that a treaty shall be operative at a certain date. With the exception of this case implications are rare, though they do occur, as, for example, in a number of treaties concluded by the United States of America concerning military missions. Thus, the Agreement of 10 December 1945 between the United States of America and Costa Rica relating to a military mission to Costa Rica, lays down that ‘this Mission shall continue for a period of four years from the date of signing of this Agreement by . . .’ (*ibid.* 3 (1947), p. 157). Probably a subsidiary agreement (e.g. a protocol or a declaration), which both in form and content constitutes an annex to a major agreement, comes into force simultaneously with the major agreement, at any rate in the absence of express provision to the contrary. For an accompanying instrument of this type see the Protocol of 14 November 1935, between Estonia and Latvia regarding the interpretation of the Convention of 14 November 1935 between Estonia, Latvia, and Lithuania concerning the reciprocal recognition and enforcement of judgments in civil matters (*L.N.T.S.* 166 (1936), p. 83). And see *infra*, p. 372.

It is possible that a closer analysis of these treaties and the circumstances in which they were concluded¹ would in some or many cases reveal some plausible inferences as to the manner by which the parties had intended to bring them into force. However that may be, some cases would probably remain—at least outside the group of exchanges of notes—in which the intention of the parties cannot be deduced from any available evidence, even if a very liberal method of interpretation is adopted. In any event consideration must be given to the hypothetical case where the parties actually had no common intention in this respect. For such situations, there must be a residuary rule of international law. This much is generally agreed, but—at least on the face of it—there is less agreement as to the content of this rule. Since very few treaties do not expressly lay down the manner in which they are to enter into force, it may of course be argued that the scope of the residuary rule is so small that the direction it takes has hardly any practical significance. This view cannot be accepted.²

The residuary rule must in fact settle two questions: (i) What is deemed decisively to express or imply the intentions of the parties with regard to the manner in which a treaty is to enter into force? (ii) If the intention of the parties has not thus been decisively expressed or implied, shall the act of signature of a treaty be deemed to express the intention of the parties to be irrevocably bound by the treaty, or is ratification necessary? There now follows an attempt to answer these two questions by an examination of the practice of States, decided cases, and the opinions of writers.

III. *The practice of States*

It is sometimes asserted that the procedure of ratification is the *regular* manner for bringing treaties into force and that other procedures are in the nature of exceptions. That this view is no longer correct is clear from the figures given above. This is shown, in addition, by the following analysis of some 1,300 treaties³—the same as those referred to above on page 359—reproduced in the *United Nations Treaty Series* (hereinafter referred to as 'the United Nations treaties') and some 1,760 treaties reproduced in the *League of Nations Treaty Series*⁴ (hereinafter referred to as 'the League

¹ The Full Powers which may have been used at the conclusion of some of these treaties are not reproduced in the *United Nations Treaty Series* and have not, therefore, been examined.

² Professor Lauterpacht points out that: 'Whatever may be their description, treaties either provide that the instrument shall be ratified or, by laying down that it shall enter into force on signature or on a specified date or event, dispense with ratification. This is the regular practice. Silence on the subject is exceptional.' (*Report on the Law of Treaties* (1953), p. 71). But the *Report* continues: 'However, it is one of the purposes of codification to provide for cases—even if rare—in which the subject is not expressly regulated by the parties.' (*Ibid.*)

³ Procedures like exchanges of notes of approval have not been counted as ratification in this examination. Only those procedures which the parties have called ratification have been counted as such.

⁴ Vols. 130-202 (Nos. 2980-4745).

treaties'). Since the League treaties consist of treaties which were registered with the League of Nations between 1932 and 1940, and the United Nations treaties consist of those which were registered with the United Nations between 1946 and 1951, the differences between corresponding figures gives a rough indication of the direction of State practice.

While of the League treaties 53 per cent. were ratified, this was the case with only 23 per cent. of the United Nations treaties.¹ Instruments called 'treaties' constituted 12 per cent. of the League treaties. Only one of these instruments was not ratified.² Of the United Nations treaties, instruments called 'treaties' constituted only 5 per cent. All of these instruments were ratified. Instruments described as 'conventions' constituted 27 per cent. of the League treaties; 90 per cent. of these instruments were ratified. Of the United Nations treaties, instruments called 'conventions' constituted only 11 per cent.; of these instruments 86 per cent. were ratified. Instruments termed 'agreements' constituted 28 per cent. of the League treaties; 40 per cent. of these instruments were ratified. Of the United Nations treaties, instruments termed 'agreements' constituted as much as 45 per cent.; of these instruments only 16 per cent. were ratified. Instruments in the form of exchanges of 'notes' constituted 24 per cent. of the League treaties; 6 per cent. of these instruments were ratified. Of the United Nations treaties, instruments in the form of exchanges of 'notes' constituted 30 per cent.; of these instruments only 2 per cent. were ratified.

Thus, while a little more than one-half of the League treaties were ratified, this was the case in relation to a little less than one-fourth of the

¹ Similar estimates have been made by several authors: Professor Eagleton has stated, with reference to the instruments in the four volumes of Hudson's *International Legislation* (1931): 'Provisions within the treaties requiring ratification are more frequent than provisions requiring signature. Indeed, they are so frequent that they raise a question as to whether ratification is required if the treaty itself fails to demand it.' (See Eagleton, 'Problems of International Legislation', in *Temperly Law Quarterly*, 8 (1934), pp. 378-9—quoted by the Harvard Research in International Law in *American Journal of International Law*, 29 (1935), Suppl., p. 759.) The instruments in the four volumes of Hudson's *International Legislation* are, however, hardly representative as a basis for an estimate of this kind.

According to Wilcox (*The Ratification of International Conventions* (1935), p. 232), about 35-40 per cent. of all treaties (excluding exchange of notes) reproduced in the first thirty-nine volumes of the *League of Nations Treaty Series* failed to contain any provision for ratification. He finds it 'evident that a very large percentage of the international agreements concluded to-day become binding by signature, which, in this case creates or attests the will of the state'. Professor Lauterpacht has stated (*Report on the Law of Treaties* (1953), p. 71) that: 'an increasing number of treaties provide, without reference to ratification, that they shall enter into force on signature or on a specified date or event thereafter. Nearly one-third of the bilateral instruments between States or organizations of States contain provisions to that effect.' According to Weinstein (loc. cit., p. 224) 'out of the first 1,000 instruments registered with the Secretariat of the United Nations, approximately 77 per cent. contained no provision for ratification', and over 85 per cent. of all instruments published in the *British Treaty Series* in the years 1946-52 inclusive contained no provision for ratification.

² Treaty of Non-Aggression of 21 August 1937 between the Republic of China and the Union of Soviet Socialist Republics, Article 4 of which provides that the Treaty shall enter into force on the day of signature (*L.N.T.S.* 181 (1937-8), p. 101).

United Nations treaties. Furthermore, instruments described either as a 'treaty' or as a 'convention' constituted 39 per cent. of the League treaties, while instruments with these denominations constituted only 16 per cent. of the United Nations treaties. There has thus been a marked decline in the use of the names 'treaty' and 'convention', while there has been an increase in the use of the name 'agreement' and in the use of the form of exchange of notes. When it is said that the tendency is away from ratification, this is believed to be quite correct, although it is perhaps only the symptom of a definite tendency towards expedition and informality in general in the conclusion of treaties.¹

A large number of modern instruments referred to by the parties as treaties are described as devoted to 'friendship', 'co-operation', 'mutual assistance', 'amity', 'general relations', 'establishment', or 'intellectual co-operation'. It is possible that for these types of treaties a desire for solemnity rather than any other reason may have induced the parties to make use of the procedure of ratification.² It is difficult to avoid this conclusion, at least for a few unusual instruments which, though they have a ratification clause, also provide for entry into force by signature. There is no indication that the entry into force by signature was of a provisional character; nevertheless, these instruments actually were ratified.³

The common practice of exchanging notes of approval—which must be distinguished from exchanges of notes in general—for the purpose of bringing treaties into force offers a contrast to the traditionally solemn

¹ Mr. Parry asserts that one of the principal changes in the practice of concluding multi-partite treaties is 'the re-emergence of bare signature as a means of the final conclusion of agreements of first importance, (loc. cit., p. 182). Professor Lauterpacht points out that statements 'to the effect that modern practice has tended to reduce the importance of signature . . . must be received with no less caution than the view that recent practice shows a tendency to dispense with ratification in favour either of signature or of new methods such as acceptance. The fact is that both signature and ratification are—apart from accession—the typical means of assuming treaty obligations.' (*Report on the Law of Treaties* (1953), p. 71.)

² The following Treaty may be mentioned as a contrast: the exchange of notes of 4 May 1946 between the United States of America and Yemen, constituting an Agreement relating to friendship and commerce (*U.N.T.S.* 4 (1947), p. 165).

³ See Article V of the Treaty of Friendship and Mutual Assistance of 18 March 1946 between Yugoslavia and Poland (*U.N.T.S.* 1 (1946-7), p. 62); Article VI of the Treaty of Friendship, Mutual Aid and Peaceful Co-operation of 9 May 1946 between Yugoslavia and Czechoslovakia (*ibid.*, p. 76); Article VI of the Treaty of Friendship and Mutual Assistance of 9 July 1946 between Yugoslavia and Albania (*ibid.*, p. 92); Article 9 of the Agreement of 12 February 1946 concerning the mutual return of property removed after the outbreak of war, between Poland and Czechoslovakia (*ibid.* 25 (1949), p. 226); Article 5 of the Treaty of Friendship and Mutual Aid of 10 March 1947 between Poland and Czechoslovakia (*ibid.*, p. 242); Article 14 of the Agreement on Cultural Relations of 6 March 1947 between Belgium and Czechoslovakia (*ibid.* 34 (1949), p. 91); Article 6 of the Treaty of Friendship, Co-operation and Mutual Assistance of 18 March 1948 between the Union of Soviet Socialist Republics and Bulgaria (*ibid.* 48 (1950), p. 144); Article 6 of the Treaty of Friendship, Co-operation and Mutual Assistance of 4 February 1948 between the Union of Soviet Socialist Republics and Roumania (*ibid.*, p. 200); and lastly, Article 4 of the Agreement of 11 October 1940 concerning the Aaland Islands between the Union of Soviet Socialist Republics and Finland (*ibid.* 67 (1950), p. 150).

procedure of ratification. The *United Nations Treaty Series*¹ includes some ninety instruments which were brought into force by exchange of notes of this kind. A large proportion of these treaties—some forty in number—consists of agreements between international organizations or between international organizations and States.² However, this practice is by no means restricted to treaties to which international organizations are parties. Furthermore, these treaties reveal no particular tendency to cover one subject-matter rather than another; nor can they all be said to be of minor importance. It is obvious that the procedure of an exchange of notes of approval fulfils practically all the functions of the procedure of ratification. While ratifications are normally documents couched in solemn form and usually signed by Heads of States and exchanged with a certain degree of ceremony, the notes of approval are simple and direct in their wording; they are signed by Foreign Ministers or diplomatic officials and exchanged without ceremony. This is in line with the general tendency already noted towards expedition and informality. Furthermore, whereas instruments of ratification are exchanged in one act, it is not necessary that an exchange of notes of approval be made in that way. If, in a particular case, there is an interval between the note proposing the entry into force of a treaty and that accepting the proposal, it is believed that—in the absence of any express provisions—the treaty enters into force on the date of the second note.³

Although it is possible to distinguish between the procedure of ratification and that of exchanging notes of approval, the two procedures are closely related.⁴ Indeed, in several cases the parties do not seem to have been aware of any difference between 'approval' and 'ratification'.⁵

¹ See *supra*, p. 359.

² E.g., trusteeship agreements. Referring to the mode of conclusion of treaties to which international organizations are parties, Professor Jessup states: 'It would be convenient to develop a practice of reciprocal confirmation that approval has been given—the equivalent of the exchange of ratifications.' (*A Modern Law of Nations* (1952), p. 130.)

³ Cf. Weinstein, *loc. cit.*, p. 210. For an express provision to this effect see the Agreement of 4 April 1947 between the United States of America and France concerning the restoration of certain industrial property rights affected by the Second World War. Article IX of this Agreement provides:

'... Each Government shall deliver to the other Government a notice that it has accepted the present agreement. . . . The present Agreement shall come into force on the day the said notices are delivered by each Government to the other. If the said notices are delivered on different days, the Agreement shall come into force on the day of the delivery of the notice later in time.' (*U.N.T.S.* 24 (1949), p. 133.)

⁴ Mr. Parry poses the question: '... why so many of the principal instruments drafted in recent years are called by any other name than that of a "treaty", and why, when such instruments provide for a process in the nature of ratification, that term is as often as not avoided. . . .' (*loc. cit.*, p. 166).

⁵ Thus, in an Agreement of 15 July 1949 between Australia and the Philippines concerning Parcel Post, Article XXIV provides for entry into force 'upon ratification or approval by proper authorities' (*U.N.T.S.* 46 (1950), p. 215).

In the English text of the Final Protocol of 18 December 1947 of the Mixed Soviet-Norwegian Commission, there is a provision for entry into force 'immediately after ratification by the Governments of the two countries, such ratification to be signified by exchange of notes'. However,

One conclusion emerges from the above examination of the practice: ratification is no longer the normal procedure for bringing treaties into force; it is only one procedure among others fulfilling the same function. Now that the traditional procedure of ratification is used for only about one-fourth of treaties, it cannot be accurately maintained that this procedure is to be applied as the residuary rule on the ground that it is the normal procedure.

The fact that most treaties expressly lay down the manner in which they are to come into force cannot indicate the content of a residuary rule. If ratification were the residuary procedure, it might be asked with Sir Gerald Fitzmaurice: 'Why do States invariably stick to the long-standing practice of specifically providing for ratification in all cases where they want ratification—if this is not necessary?'¹ Assuming, on the other hand, that the residuary rule provides for entry into force by signature, it might similarly be asked why so many treaties expressly provide for entry into force by signature.² The only—somewhat unhelpful—conclusion which can be drawn from the practice of laying down expressly the manner in which treaties are to come into force is probably that the residuary rule is not very well established.³

this seems to be a mistranslation of the Norwegian and Russian texts. The French translation uses the word 'approbation' and is more in accordance with the original texts. (See *ibid.* 52 (1950), p. 213.) Professor Lauterpacht points out a similar discrepancy between different texts of one and the same treaty (*Report on the Law of Treaties* (1953), p. 74, n. 1).

In a Protocol of 9 February 1948 between Belgium and Italy concerning the recruiting of Italian workers and their settlement in Belgium, Article 21 provides for entry into force upon 'ratification by each Government concerned, such ratifications to be effected as soon as possible through the regular diplomatic channel'. According to a footnote by the United Nations Secretariat, the Protocol was brought into force by an exchange of notes (*U.N.T.S.* 71 (1950), p. 143).

On the other hand, the Agreement of 23 January 1940 between Brazil and Argentina concerning the legalization of cargo manifests provides, in Article IV, that the Agreement shall be applied 'following its approval by both Governments'. A footnote by the United Nations Secretariat states that the Agreement 'came into force on 8 April 1941 by the exchange of the instruments of ratification at Rio de Janeiro' (*ibid.* 51 (1950), p. 281).

¹ *Loc. cit.*, p. 123. Dr. Vitta, admitting that Sir Gerald's conclusion *a contrario* is a method which is permissible in general, rejects it in this connexion for the reason that he finds that international practice and jurisprudence almost unanimously are against it ('La Validité des traités internationaux', in *Bibliotheca Visseriana*, 14 (1940), pp. 230-1).

² See Camara, *op. cit.*, pp. 40-41.

³ See Fitzmaurice's view, *loc. cit.*, p. 124. An extreme example may be mentioned of the uncertainty which may exist as to the question what acts shall constitute a final and binding consent of a State. An International Plant Protection Convention was opened for signature at Rome on 6 December 1951. It remained open for signature to 1 May 1952. It expressly provides for ratification at the earliest possible date (Article XII) and for entry into force 'as soon as this Convention has been ratified by three signatory Governments' (Article XIV). However, the following surprising facts appear from a letter of 17 June 1952 from the Director General of the Food and Agriculture Organization: 22 States signed expressly *ad referendum*; representatives of 11 Governments signed the Convention without indicating expressly that their signatures were *ad referendum*, but their Governments informed the Director General officially that ratification would be necessary; representatives of four other States also signed without the indication '*ad referendum*', but the Governments concerned advised the Director General officially that the signatures of their representatives were *not* subject to ratification and that their adherence was therefore fully effective. The letter states, furthermore, that 'the Convention came into force

However, if we look to the practice of States for the content of the residuary rule, the correct approach would seem to be to look not primarily at those treaties which expressly lay down the manner in which they are to enter into force, but at those which do not contain provisions bearing on the matter. Admittedly, these treaties are not very numerous.¹ How variously the practice on the subject has been interpreted may be gauged by comparing the views of writers who have devoted special attention to the subject. Basdevant, writing in 1926, says:

‘... les traités contiennent d’ordinaire une clause en vertu de laquelle ils seront ratifiés dans un délai déterminé. En outre il arrive qu’on procède à la ratification pour des traités ne contenant pas de semblable clause.’²

He gives three examples, the most recent being an arrangement concluded in 1915. Lauterpacht, on the other hand, writing in 1953, states:

‘... in those rare cases in which a treaty has been silent on the matter [of ratification] there has been a tendency to assume that no requirement of ratification was intended.’³

He gives two instances: one from 1933, the other from 1935.

An examination of the modern practice of States⁴ gives convincing support to Professor Lauterpacht’s view. Exchanges of notes frequently lack provisions concerning the mode of entry into force; in such cases they are not, as a rule, ratified. Of the League treaties, some seventy-five such exchanges of notes were found, and none of them was ratified. Of the United Nations treaties, some 125 such exchanges of notes were found, and only one of them was ratified.⁵ Treaties in forms other than exchanges of notes fail less frequently to contain express provisions as to the mode of entry into force. Nevertheless, when they do not contain express provisions, the tendency is clearly towards entry into force by signature. In the League practice that tendency was less conspicuous than in the practice of the United Nations. Some five treaties of the League period were brought into force by ratification without this being expressly provided for or clearly

in accordance with the provisions of Article XIV, between Ceylon, Spain and Chile on 3 April 1952, date of signature [*sic*] by the representative of Chile’. Two similar examples are mentioned by Briggs, *The Law of Nations* (2nd ed., 1953), pp. 862 and 863.

¹ Parry asserts that before the time of the League of Nations ‘it was, curiously, uncommon to stipulate expressly in treaties as to the date of their entry into force’ (loc. cit., p. 153).

² Loc. cit., p. 576.

³ *Report on the Law of Treaties*, p. 78.

⁴ See *supra*, pp. 361 ff.

⁵ Exchange of notes between the United States of America and Turkey, relating to the application of most-favoured-nation treatment to the merchandise trade of certain areas under occupation or control. The notes were exchanged at Ankara on 4 July 1948. The fifth Article of these notes lays down the duration of the Agreement, but provides nothing as to the manner in which it was to enter into force. A footnote in the *United Nations Treaty Series* states that the Agreement ‘came into force on the 13 July 1948, by notice of ratification thereof given to the Government of the United States of America by the Government of Turkey (*U.N.T.S.* 34 (1949), p. 185).

implied;¹ one treaty was brought into force by an exchange of notes.² It is possible that in all six cases the subsequent approval might have been reserved in Full Powers issued before the conclusion of the treaties. However, the instances were much more frequent of treaties entering into force by signature without any clear indication to this effect in the text of the treaties.³ An examination of the United Nations practice gives even clearer results. Nearly all the fifty treaties—other than exchanges of notes—the texts of which contain no express provisions or clear implications as to the mode of entry into force, actually entered into force by signature.⁴ A few treaties were brought into force by acts subsequent to signature—but not in the form of ratification—though this was neither provided for nor implied in the texts of these treaties.⁵ Although a closer examination of the texts of all the treaties mentioned and the relevant Full Powers might reveal some facts from which the mode of entry into force could be inferred,⁶ it is difficult to avoid the conclusion that there exists a belief among those who conclude treaties on behalf of States that treaties enter into force by signature if no other mode is expressly provided for or clearly implied.

¹ E.g., Agreement of 20 November 1931 between Belgium and France regarding the reparation for war damage suffered by inhabitants or caused to territories of the regions annexed to the two countries in virtue of the Treaty of Versailles of 28 June 1919 (*L.N.T.S.* 152 (1934), p. 121); Convention of 21 March 1930 between the Republic of Costa Rica and Spain for the settlement of difficulties resulting from the military obligations of persons possessing Spanish nationality under Spanish law and Costa Rican nationality under Costa Rican law (*ibid.* 168 (1936), p. 61); Agreement of 9 June 1933 between France and Switzerland concerning reciprocity in the relief of unemployed persons (*ibid.* 181 (1937-8), p. 275).

² Arrangement of 28 January 1935 between Denmark and France for facilitating the admission of student employees into the two countries. A note by the League of Nations Secretariat states that 'this Arrangement was put into force as from February 1st, 1935, by an Exchange of Notes' (*L.N.T.S.* 158 (1935-6), p. 11).

³ E.g., Convention of 21 April 1938 between Finland and Norway regarding new regulations for fishing in the River Pasvik (*L.N.T.S.* 188 (1938), p. 214); Protocol of 24 April 1934 between the United States of America and Mexico relative to claims presented to the General Claims Commission established by the Convention of 8 September 1923 (*ibid.* 149 (1934), p. 49); Declaration of 2 January 1937 between His Majesty's Government in the United Kingdom and the Italian Government concerning assurances with regard to the Mediterranean (*ibid.* 177 (1937), p. 241).

⁴ E.g., two Financial Agreements of 14 June 1940 between the Netherlands and the United Kingdom (*U.N.T.S.* 2 (1947), pp. 251 and 275); Financial Agreement of 14 June 1940 between the Netherlands and France (*ibid.*, p. 263); Cultural Agreement of 22 February 1946 between Belgium and France (*ibid.* 68 (1950), p. 157); Agreement of 30 October 1947 between the Governments of the United States of America and Canada supplementary to the General Agreement on Tariffs and Trade (*ibid.* 27 (1949), p. 19); Air Transport Agreement of 10 May 1948 between Ireland and the Netherlands (*ibid.* 28 (1949), p. 121). See *infra*, p. 378, n. 5.

⁵ Agreement of 12 October 1944 between the Government of the United States of Brazil and the United Nations Relief and Rehabilitation Administration (U.N.R.R.A.) for the constitution in Rio de Janeiro of a mixed commission for U.N.R.R.A. procurement in Brazil. A footnote by the United Nations Secretariat states: 'Came into force on 25 October 1944, by the approval of the Government of Brazil' (*U.N.T.S.* 67 (1950), p. 321); Agreement of 14 April 1949 between the Belgian and British frontier control authorities respecting the issue of frontier passes for the crossing of the frontier between the territory under Belgian occupation and the German frontier zone under British occupation. A footnote by the United Nations Secretariat states: 'Came into force on 23 April 1949, by mutual agreement between the competent authorities' (*ibid.* 65 (1950), p. 117).

⁶ See *supra*, p. 361.

It is impossible, on such limited material as that used above, to ascertain any variations in the practice of individual States. A certain amount of information in this respect can, however, be gained from other sources.¹ Thus the Pan-American Convention on Treaties, adopted at Havana on 20 February 1928, has often been referred to as evidence of a regional practice. Article 5 provides:

'Treaties are obligatory only after ratification by the contracting States, even though this condition is not stipulated in the full powers of the negotiators or does not appear in the treaty itself.'²

The language of the Article is categorical enough. However, its value should not be over-estimated. The Convention, which was signed in 1928 by twenty-one States, had, up to 1 July 1931, been ratified by only three States,³ and, up to 1 January 1951, by seven States altogether.⁴ Moreover, though the Article provides for no exceptions, it cannot well be assumed that in Pan-American practice treaties in the form of exchanges of notes should be subject to ratification unless they dispense expressly with this procedure. The most reasonable interpretation of the Article seems to be that the word 'treaty' has been used in a specific and not in a generic sense. The intention may have been to exclude from the scope of the Article all treaties which are not called 'treaties' by the parties, or to exclude 'executive agreements' or some other category of compacts. There is nothing in the Convention, however, to suggest which categories the parties intended to exclude. As long as the scope of the Article remains undefined its value as evidence of a regional practice is limited.

The United Kingdom is probably the only State which prefers to avoid the procedure of ratification whenever possible.⁵ There is evidence that treaties which contain no reference to ratification are regarded by the United Kingdom as not being subject to ratification.⁶ This seems also to be the practice of the French Government. In a memorandum of 10 January 1953 submitted to the United Nations, it stated as follows:

¹ Mr. Parry asserts that 'some States, and notably China, the U.S.S.R. and the Latin-American Republics remain faithful to the traditional usage [of the procedure of ratification]' (op. cit., p. 171). That statement is not, however, germane to the problem here at issue. It is concerned with treaties in general and not specifically with those which lack express provisions as to the mode of their entry into force. The same applies to the following sentence in the Protocol of the Berlin Congress of 1878: 'Le Congrès considère en effet que ce sont les ratifications et non pas seulement la signature qui donnent aux traités leur valeur définitive.'

² See Hudson, *International Legislation*, vol. iv, p. 2380; *American Journal of International Law*, 1928, Suppl., p. 139.

³ See Hudson, op. cit., p. 2378.

⁴ See Hudson, *Cases on International Law* (1951), p. 448.

⁵ See Parry, op. cit., p. 156.

⁶ In a debate in the House of Lords on 11 March 1953 Viscount Swinton, Secretary of State for Commonwealth Relations, stated that 'internationally there is never any necessity for ratification unless an agreement so provides' (House of Lords *Weekly Hansard*, No. 180, 9 March 1953, or *The Times* newspaper, 12 March 1953). A clearer formulation could hardly have been chosen. See also *infra*, p. 372.

'Certains traités ne prévoient pas qu'une ratification devra suivre la signature. Dans ce cas la signature, si elle est donnée sans condition (une signature *ad referendum* est une signature sous condition), engage définitivement l'Etat.'¹

The new Constitution of the Netherlands, which entered into force on 22 June 1953, provides in Article 60:

'Agreements with other Powers and with organizations based on international law shall be concluded by or by authority of the King. *If required by such agreements* they shall be ratified by the King. . . .'²

The Dutch Constitution seems to be the only one which, implicitly, deals with treaties which do not expressly provide the mode of their entry into force. As this modern Constitution contains detailed and elaborate provisions concerning the treaty-making power, its formulation of Article 60 deserves attention. It would seem, *a contrario*, that there is no duty for the King of the Netherlands to bring a treaty into force by ratification if the treaty does not expressly so provide.

Thus, in so far as it can conveniently be ascertained, the practice of individual States seems to confirm—or at least not to contradict—the conclusion reached above, namely, that treaties are intended to enter into force by signature if no other mode is expressly prescribed or otherwise clearly indicated.

IV. *Decided cases*

There appears to be no case concerned with the mode of entry into force of a treaty which failed to contain an express provision with regard to the requirement of ratification. It is therefore necessary to look for possible guidance from cases in which courts have pronounced on treaties containing express provisions as to the mode of coming into force.

The case of *The Eliza Ann* is often referred to as evidence of the so-called 'necessity of ratification'. In this case, which was decided in 1813, Sir William Scott stated that

'according to the practice now prevailing a subsequent ratification is essentially necessary . . .'.⁴

The Treaty to which this statement referred expressly provided for ratification. Although it is now generally agreed that a treaty which provides for ratification becomes binding only through ratification (unless the contrary is expressly laid down), this was by no means self-evident in 1813, and the great value of the case, therefore, lies in its clear pronouncement on this point.

¹ See 'Laws and Practices concerning the Conclusion of Treaties', in *United Nations Legislative Series* (1953), p. 48.

² See van Panhuys in *American Journal of International Law*, 47 (1953), p. 537, at p. 538 (italics added).

³ *Supra*, p. 367.

⁴ 1 Dodson 244, at p. 248.

As late as 1893, the French *Cour de Cassation* pronounced in the opposite sense. In the case of *The Île d'Anjouan*, this Court stated as follows:

'La ratification par le souverain d'un traité passé par ses représentants n'est nécessaire que pour le rendre définitif, non pour lui donner force obligatoire.'¹

This judgment was criticized by several writers,² and it has not been followed by other courts. On the contrary, in the twentieth century courts have repeatedly acted upon the principle expressed in *The Eliza Ann*. A statement by Judge Bassett Moore in his Dissenting Opinion in the case of the *Mavrommatis Palestine Concessions*—decided by the Permanent Court of International Justice in 1924—is frequently quoted in this connexion:

'The doctrine that governments are bound to ratify whatever their plenipotentiaries, acting within the limits of their instructions, may sign, and that *treaties may therefore be regarded as legally operative and enforceable before they have been ratified, is obsolete and lingers only as an echo from the past.*'³

Even more authoritative is a statement by the Permanent Court of International Justice in its Judgment given in 1929 in the case concerning the *Territorial Jurisdiction of the International Commission of the River Oder*. The Court said that amongst the ordinary rules of international law 'is the rule that conventions, save in certain exceptional cases, are binding only by virtue of their ratification'.⁴ It would seem that Dehousse, writing in 1935, was justified in saying:

'... plus on se rapproche de l'époque contemporaine, plus l'opinion internationale au sujet de la règle qui nous intéresse gagne en énergie et précision'.⁵

However, what the courts have established with increasing clarity is merely that in law the procedure of ratification is not a ceremonial formality but an act by which a State becomes bound by a treaty. As a corollary, it follows that a State does not become bound by a treaty by its signature, if that treaty is to be ratified. This, and nothing else, seems to be the conclusion to be drawn from the cases mentioned above, in all of which the treaties concerned have expressly provided for ratification.

In the case of the *River Oder Commission*, the phrase 'certain exceptional cases' can hardly, at the time when this case was decided, have referred to the then already large category of treaties which, by virtue of an express provision, entered into force by signature.⁶ It seems more reasonable to assume that the phrase refers to the admittedly small number of treaties which provide for ratification but also expressly lay down that they are to become binding by signature.⁷ Thus Professor Lauterpacht, who gives a restricted interpretation to the case, has expressed doubts whether the

¹ Quoted from Dehousse, *op. cit.*, p. 94.

² *P.C.I.J.*, Series A, No. 2, at p. 57 (*italics added*).

³ *Op. cit.*, p. 95.

⁴ See *supra*, p. 360, n. 1; cf. p. 363, n. 3.

⁵ *Ibid.*, n. 2.

⁶ *Ibid.*, No. 23, at p. 20.

⁷ But see *ibid.*, pp. 95-96.

Judgment of the Court can properly be cited as an authority for the proposition that treaties require ratification.¹ Regardless of whether such a restrictive interpretation of the decision is adopted or not, the case cannot possibly be held to be indicative of *when* ratification is required. The Court appears to have used the term 'convention' in a specific and not in a generic sense. However, as in the Havana Convention,² this use of the terms 'treaty' and 'convention' in a specific sense does not solve the problem unless it is made clear what that specific sense is. This was not done in the *River Oder Commission* case. Nor has this been attempted in the cases in which courts have recognized as valid treaties—in the generic sense of the term—which were not ratified. Thus, in the *Paris Agreement* case decided in 1922 by the German *Reichsgericht* in Civil Matters, the Court upheld the validity of an Agreement between Poland and Germany concluded on 9 January 1920, an Agreement which was neither published in the *Journal of the Laws of the Reich* nor ratified. With reference to this Agreement the Court said:

'It was concluded by the representatives of the German and Polish Governments. It contained no provision for ratification, and no ratification was necessary.'³

It added:

'... there exists, in addition to the solemn form of treaties, an informal type of agreement. . . . In regard to the second the representatives of the State are authorized to conclude a final agreement which comes into being by the signature of a common document or the exchange of separate documents.'⁴

This and similar cases⁵ confirm what has never been questioned in the practice of States, namely, that a treaty may enter into force without being ratified; but it does not bring us closer to answering the question *when* treaties may enter into force otherwise than by ratification. Indeed, before 1952 no court seems to have concerned itself with the problem of deciding when, in the light of the common modern practice of bringing treaties into force by signature, international ratification is necessary to make a treaty binding in the international sphere.⁶ In that year some light was thrown upon the problem by the Judgment of the International Court of Justice in the *Ambatielos* case (Jurisdiction).⁷ The Court in that case found itself

¹ *Report on the Law of Treaties* (1953), p. 81.

² See *supra*, p. 368.

³ See *Annual Digest and Reports of Public International Law Cases*, 1919-22, Case No. 225. The original German Report states that 'eine besondere Ratifikation des Vertrags ist nicht vorbehalten, war aber auch nicht erforderlich': see *Entscheidungen des Reichsgerichts in Zivilsachen*, vol. 105, p. 159.

⁴ *Annual Digest*, 1919-22, Case No. 225.

⁵ See the judgment of the German *Staatsgerichtshof* given in 1930 in the case of *Baden, Bavaria, Saxony and Württemberg v. German Reich* (*Annual Digest*, 1929-30, Case No. 217). Weinstein (*loc. cit.*, pp. 215-23) cites a number of cases where courts have upheld the validity of agreements in the form of exchanges of notes, despite the fact that they were not ratified.

⁶ It was not until 1924 that this problem was treated extensively by a writer, namely, Bittner (*op. cit.*).

⁷ *I.C.J. Reports*, 1952, p. 28.

competent to interpret a Declaration of 16 July 1926 between the United Kingdom and Greece, on the ground that the provisions of this Declaration constituted provisions of a Treaty of the same date between the same parties, a Treaty which contained an express provision making the Court competent to interpret it. While the Declaration did not expressly lay down the procedure by which it was to come into force,¹ the Treaty expressly provided for ratification.² The Declaration began with an express reference to the Treaty:

'It is well understood that the Treaty of Commerce and Navigation between Great Britain and Greece of to-day's date does not prejudice claims on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886. . . .'³

The Treaty of 1926, on the other hand, contained no reference to the Declaration. In the instruments by which the Treaty of 1926 was ratified, the Declaration was also included. Judge McNair, in his Dissenting Opinion, while accepting the view that the Declaration was in fact ratified by the United Kingdom, stated that 'according to the practice of the United Kingdom, the Declaration did not require ratification'.⁴ It is no doubt correct that, according to British practice, a declaration does not require ratification unless this is expressly laid down in the declaration.⁵ But it would seem that in the case of this particular Declaration it must be deemed to have been clearly implied that it should not enter into force by signature alone. It may be doubted whether the material contents of the Declaration were germane to the Treaty of the same date.⁶ However, the authors of the Declaration seem to have thought so, judging by the wording they used; for it seems to have had the effect of limiting the scope of the Treaty of the same date. If, therefore, the Declaration was thought to limit the effects of the Treaty of 1926, it would also seem to follow that it must have been thought to enter into force either simultaneously with or after the Treaty the effects of which it was thought to limit. Before the Treaty of 1926 was ratified, there was nothing to limit. The Court found unanimously that the Treaty and the Declaration were brought into force by the same instruments of ratification. The majority of the Court attached importance to the wording of the British instrument of ratification. This instrument, before reproducing the text of the Treaty of 1926, used the words 'which Treaty is, word for word as follows . . .'.⁷ After that phrase, however, not only was the Treaty itself reproduced, but also the Declaration and a schedule. This formal arrangement of the British instrument of ratification,

¹ *I.C.J. Reports*, 1952, p. 36.

² *Ibid.*, p. 40.

³ *Ibid.*, p. 36.

⁴ *Ibid.*, p. 60.

⁵ See McNair, *The Law of Treaties* (1938), pp. 85-87; and Professor Lauterpacht's *Report on the Law of Treaties* (1953), p. 76. See also *supra*, p. 368.

⁶ See the Dissenting Opinion of Judge McNair: *I.C.J. Reports*, 1952, p. 63.

⁷ *Ibid.*, p. 43.

perhaps more than anything else, seems to have led the majority of the Court to the conclusion that the Declaration was a part of the Treaty. In this connexion the Court made a statement which is of particular interest in relation to the present inquiry. The Court said:

'The ratification of a treaty which *provides for ratification*, as does the Treaty of 1926, is an indispensable condition for bringing it into operation. It is not, therefore, a mere formal act, but an act of vital importance.'¹

What the Court intended, in the first place, to express was its opinion that instruments of ratification should not be regarded as stereotyped formalities the wording of which does not lightly permit of conclusions regarding the intentions of the parties.² The Court seems to have come to this opinion in view of the great juridical importance it attaches to the act of ratification. So far the Court only continued on the lines laid down by Judge Bassett Moore in his statement, quoted above,³ in the *Mavrommatis Palestine Concessions* Case and by the Permanent Court of International Justice in its statement, also quoted above,⁴ in the *River Oder Commission* Case. However, while neither of those two statements was qualified by any reference to the many treaties which enter into force otherwise than by ratification, the statement quoted from the *Ambatielos* case is qualified, and, therefore, indicative of when the procedure of ratification is necessary.

The Court laid down that ratification is indispensable for a 'treaty which provides for ratification'. It seems significant that the Court did not say that the ratification of a treaty which does not dispense with it is a necessary condition for bringing the treaty into operation. One may not, perhaps, be justified in concluding *a contrario* that it is the Court's view that ratification can never be required if a treaty does not provide for it. Nevertheless, it is important to keep in mind that this, the most recent and only authoritative statement of a court which touches pertinently on our problem, gives at least no support to the view that ratification is required where the treaty is silent on the matter.

V. *Opinions of writers*

The majority of modern writers hold that in case of doubt ratification is required.⁵ This is now the 'traditional' view. Only a relatively small number of writers have been of the view that, in case of doubt, a treaty enters into force by signature.⁶ Writers who adhere to the 'traditional' view usually take as the starting-point the rule that in principle ratification is required.

¹ *I.C.J. Reports*, 1952, p. 43 (italics added).

² Judge McNair in his Dissenting Opinion expressed—with better reason, it is believed—the opposite view: see *ibid.*, pp. 61–62.

³ See *supra*, p. 370.

⁵ For a number of quotations see Fitzmaurice, *loc. cit.*, pp. 122 ff.

⁶ See *infra*, p. 379.

⁴ *Ibid.*

Having satisfied themselves as to the existence of this principle, they proceed to enumerate a smaller or larger number of exceptions, one of which always includes the treaties which expressly provide for entry into force by some other method than ratification.

The fact that this traditional formulation of the rule begins with the need for ratification would seem to indicate that this is the normal procedure for bringing treaties into force. We have already seen,¹ however, that no more than one-quarter of all modern treaties are actually ratified, whereas the rest enter into force otherwise. It would perhaps seem that the more accurate course would be one beginning with the case which is the most common in the practice of States, namely, entry into force by signature.

Several modern writers² make a distinction between 'treaties proper' and 'agreements in simplified form'. It is asserted that the former, but not the latter, must be ratified. This theory is descriptive of practice but does not answer the question *when* treaties must be ratified.³ It may be begging the question to say that 'treaties proper' require ratification, while defining 'treaties proper' as compacts concluded with the intervention of the organ vested with the treaty-making power.⁴ Of course, 'treaties proper' might indirectly become a distinct group if all the compacts which are not regarded as 'treaties proper' were given a precise definition. However, when we examine Basdevant's description of these compacts, the only way in which they seem to differ substantially from treaties is, again, in that they are not ratified. Speaking of bilateral or collective diplomatic instruments, other than treaties, Basdevant says:

'Ceux-ci sont établis de concert par les agents de deux ou de plusieurs États. Ces instruments portent des noms très divers; procès-verbal, protocole, déclarations, arrangement, accord, acte final, etc. Leur objet est très varié. Parfois l'instrument vise à constater un simple fait: le fait d'un échange de ratification, les faits qui se sont passés, les paroles qui ont été prononcées au cours d'une conférence diplomatique; parfois il a pour objet de constater un accord créateur d'obligations réciproques: il est alors analogue à un traité, mais avec une forme moins solennelle, l'accord étant conclu *sans l'intervention des chefs d'État*.'⁵

¹ See *supra*, p. 362.

² See Basdevant, *op. cit.*; Rousseau, *op. cit.*, pp. 190 and 249-50; François, 'Règles générales du droit de la paix', in Hague Academy, *Recueil des Cours*, 1938 (iv), pp. 160 and 168; Anzilotti, *op. cit.*, pp. 368, 370, and 373; Dehousse, *op. cit.*, pp. 96 ff.

³ Basdevant seems to have been the first writer to have presented this distinction in its pure form. Dehousse (*op. cit.*, p. 96) asserts that 'C'est à Bittner que revient le mérite d'avoir, le premier, jeté les bases de cette discrimination, qui a eu un écho considérable dans la doctrine du droit des gens'. However, although Basdevant must have been inspired by Bittner's ideas, the two theories are very different and cannot very well be treated together. See *infra*, p. 375.

⁴ Dr. Jones, discussing the distinction made in the United States between 'treaties' and 'executive agreements', finds similarly: 'There appears to be a vicious circle: treaties must be ratified by the President by and with the consent of the Senate. If we ask what is a treaty, for this purpose, the answer is: any agreement which has been so ratified' (*op. cit.*, p. 57).

⁵ *Op. cit.*, p. 610 (italics added).

This appears to amount not to the formulation of a rule which tells us when ratification is necessary, but only to a description of current practice. The learned writer has simply found that the most easily ascertainable criteria for a classification of compacts is the presence or absence of ratification.

Bittner makes a distinction between treaties which are concluded in accordance with a 'complex procedure' and those which are concluded 'immediately'.¹ Had the writer distinguished between these two types of treaties only on the ground that the first is to be ratified whereas the second is not, it would have been unnecessary to consider this theory separately. However, Bittner asserts that the essential difference between the two types of conclusion of treaties lies in the competence of the agents signing the treaties. Whereas in the procedure of complex conclusion the agent is said always to have a formal instrument of Full Power enabling him to negotiate and sign a treaty subject to ratification,² the agent concluding a treaty which is binding immediately is said to have a *Beurkundungsauftrag*³—an instruction to sign, with immediately binding effect, an agreement which has already been approved by the treaty-making power of his State.

According to Bittner, the text of a treaty which is concluded in accordance with the complex procedure—and must therefore be ratified—always contains a reference to the Full Powers of the agents who signed it,⁴ while treaties concluded with immediately binding effect—which need not be ratified—normally contain references to *Beurkundungsaufträge*, for instance in phrases like 'the undersigned being duly authorised . . .'.⁵ If the alleged distinction between *Beurkundungsaufträge* and Full Powers is consistently maintained, and if evidence can always be found indicating which of the two kinds of authorizations had been given, this evidence might, for any treaty lacking an express clause concerning its entry into force, provide the answer whether the treaty must be ratified or whether it enters into force upon signature.⁶ It is admittedly true that treaties which are ratified frequently contain references to Full Powers and that final clauses or preambles of treaties entering into force by signature often refer to the agents signing as being authorized, i.e. as agents who have received *Beurkundungsaufträge*. However, this common and traditional phraseology is by no means so consistent as to permit of any definite conclusions concerning the mode of

¹ Op. cit., p. 5.

² Op. cit., pp. 47-48.

³ A person who receives a *Beurkundungsauftrag*, according to Bittner, has no discretion. He does not form the will of the State; he does not exercise the treaty-making power. The *Beurkundungsauftrag* is both an authorization and an instruction to sign as a proxy: see *ibid.*, pp. 40 ff.

⁴ *Ibid.*, p. 48. See also *ibid.*, p. 139, n. 499.

⁵ *Ibid.*, pp. 41 ff.

⁶ This conclusion is not expressly drawn by Bittner, but—although he maintains that should the Full Powers expressly dispense with ratification, such would not be required (*op. cit.*, pp. 141-2)—the implication of his theory is that the *intentions* of the parties as to the mode of entry into force of the treaty can be found in the existence of Full Powers and *Beurkundungsaufträge* respectively.

entry into force of any given treaty.¹ Even though the phraseology of modern treaties is found to be inconsistent on this point it would, of course, be conceivable that Full Powers might always be issued for the conclusion of treaties which are intended to be ratified, but for no others. However, an examination of treaties which were signed on behalf of Sweden in 1951² showed that in practice, and regardless of inconsistencies in the texts of treaties, a distinction between Full Powers and *Beurkundungsaufträge* is not consistently upheld. For treaties which were to be ratified, a Full Power was occasionally sent by telegram;³ on occasions no Full Power was issued at all. The instruments issued sometimes—though not as a rule—reserved ratification.⁴ For treaties concluded with immediately binding effect, on the other hand, an instrument providing evidence of a *Beurkundungsauftrag* was normally not issued. It appeared, however, that even in this procedure formal instruments called Full Powers were at times issued,⁵ and that

¹ Thus, for instance, an Agreement of 6 December 1945 between the United Kingdom and Portugal concerning air services refers to the representatives signing as 'duly authorised' while at the same time providing for ratification (*U.N.T.S.* 6 (1947), p. 3). For an example of a treaty which refers to the representatives signing as both having 'exchanged their credentials' and being 'duly authorised', while expressly providing for entry into force by signature, see the Agreement of 24 May 1946 between the United States of America and the Union of Soviet Socialist Republics concerning the organization of commercial radio teletype communication channels (*ibid.* 4 (1947), p. 201). That the word 'credentials' here is equivalent to Full Powers is evidenced by the word used in the Russian text.

² Practically all the treaties examined are reproduced or mentioned in the official Swedish Treaty Series, *Sveriges överenskommelser med främmande makter*, 1951 (published in 1953), abbreviated *S.Ö.*

In order to ascertain whether, in the case of each particular treaty, Full Powers had been issued, this examination was carried out in the Swedish Foreign Office. The writer of this article was kindly given access to all the necessary documents, for which permission he expresses his thanks. He is particularly indebted to Dr. Ivar Beskow, without whose assistance the examination would have been impossible, and whose advice was invaluable.

³ E.g., at the conclusion of the Agreement of 6 April 1951 between Sweden and Canada for the avoidance of double taxation (*S.Ö.* 1951, p. 383). The cable was addressed to 'Envoyén Wijkman Svensk Ottawa', and read as follows: 'The King in Council have authorised You to sign the agreement for avoidance of double taxation on behalf of Sweden.' It was signed 'Cabinet'. There is no doubt that this telegram, and others similar to it, were intended to serve as Full Powers. Telegrams sent merely for the purpose of instruction were not addressed to the person, but to 'svensk'; they were written in Swedish and always signed 'Cabinet'. The cables constituting Full Powers were often—but, as appears from the example quoted, not consistently—signed with the name of the Swedish Foreign Minister. The Agreement for the conclusion of which the telegram above quoted was sent, expressly provided for entry into force by ratification. The person who signed on behalf of Canada communicated a formal Full Power.

⁴ Bittner states that 'Nach den Bestimmungen aller Vollmachten haben die Unterhändler . . . das Ergebnis der Verhandlungen unter Vorbehalt der Genehmigung der Auftraggeber zu beurkunden' (*op. cit.*, p. 140). In the same sense see the statement by Fitzmaurice, *loc. cit.*, p. 125, but cf. p. 129. That not all Full Powers contain reservations as to ratification is, however, well known. See, for instance, Jones, *op. cit.*, p. 30. Cf. *infra*, p. 377, n. 2.

⁵ E.g., at the conclusion of a Protocol of 24 January 1951 between Sweden and Spain concerning the exchange of goods and payments (*S.Ö.* 1951, p. 18). Both the Spanish and the Swedish representative signing the Protocol were provided with formal Full Powers. The text of the Protocol does not refer to the Full Powers or to the competence of the representatives signing.

It may be noted, in this connexion, that Dr. Jones was aware of the fact that Full Powers may be issued before the conclusion of a treaty which is to enter into force by signature: see *op. cit.*, p. 53.

occasionally telegrams of the above-mentioned type were sent.¹ None of these formal instruments and telegrams reserved ratification. It thus seems clear that the fact that an agent possesses a Full Power does not necessarily imply that he has not been authorized to conclude a treaty to be binding immediately and that, therefore, ratification should be required; nor does the fact that an agent has not been provided with a formal Full Power necessarily imply that he is authorized to conclude a treaty to be binding immediately upon his signature.²

Article 7 of the Harvard Draft on Treaties offers a carefully drafted formulation of the rule concerning ratification. It avoids the distinction between 'treaties proper' and 'agreements in simplified form'. Nor does it make direct reference to treaties of specified content or to the competence of the agents signing. Yet all these elements may be considered under the Harvard rule. The last paragraph of Article 7 maintains the necessity for ratification:

'... when the form or nature of the treaty or the attendant circumstances do not indicate an intention to dispense with the necessity for ratification.'³

According to this formulation, what is relevant is the intention of the parties and whether these intentions are somehow expressed or can possibly be inferred. It is interesting to note, in the Comment to this formulation, what facts may be regarded as inferring the intention to dispense with the procedure of ratification. Among these is the fact that a compact has been concluded by certain subordinate officials of a State, such as military officers, postal authorities, &c.;⁴ and possibly also 'the fact that the treaty is

¹ See *supra*, p. 376, n. 3. For the bringing into force, by way of an exchange of notes, of a procès-verbal drawn up by a mixed Swedish-French Commission and signed in Paris on 21 March 1951, a telegraphic Full Power was sent on 7 April 1951, reading as follows:

'Monsieur Westman Ambassadeur Suède Paris

'Vous êtes autorisé échanger notes mise en vigueur procès verbal de la commission mixte suédo-française du 21 mars 1951

Östen Unden

Ministre Affaires Etrangères.'

The notes were exchanged on 11 April 1951, which was regarded as the date of the Treaty (*S.Ö. 1951*, p. 203).

² The only cases where Full Powers are useful as clearly implying the intentions of the parties with regard to the mode of entry into force of treaties seem to be when they expressly reserve (or promise) ratification, or—which is less likely—expressly dispense with ratification. Thus, if—as often happens—a Full Power is silent as regards ratification, no conclusion concerning the mode of entry into force of the treaty can, in case of doubt, be drawn from this fact. This matter has been discussed by Jones, *op. cit.*, p. 30; Fitzmaurice, *loc. cit.*, pp. 125 and 129; and by the Harvard Research, in *American Journal of International Law*, 29 (1935), Suppl., p. 766.

³ See *ibid.*, p. 756. See also Article 5 of the second *Report on the Law of Treaties*, submitted by Professor Brierly to the International Law Commission, 10 April 1951 (U.N. Doc. A/CN.4/43); Article 6 of the third *Report on the Law of Treaties*, being Articles tentatively adopted by the International Law Commission at its third Session, with comment, 10 April 1952 (U.N. Doc. A/CN.4/54, p. 10); and, finally, Article 6 of Professor Lauterpacht's *Report on the Law of Treaties*, submitted to the International Law Commission on 24 March 1953 (U.N. Doc. A/CN.4/63, p. 67).

⁴ See *American Journal of International Law*, 29 (1935), Suppl., p. 768.

recorded in a certain form'.¹ However, the authors of the Comment use guarded language on this point:

'... it seems impossible to lay down any definite and universally applicable rule that treaties in certain forms or designated by certain names are ... to be presumed not to be subject to ratification. It is possible, however, that in the practice of certain States, a particular form or name will regularly be given to instruments which they do not consider as requiring ratification. If, then, these States record an agreement in an instrument having such form and name, the inference will be that ratification is intended to be dispensed with.'

And further:

'It is obviously impossible to be exhaustive or dogmatic in the matter; the circumstances in each particular case must be taken into account in applying the rule ... and what may indicate an intention to dispense with ratification in one case may not in another. All that can be said definitely is that, *if there be any doubt, it is to be resolved in favor of a necessity for ratification.*'²

With regard to a great many treaties which have manifestly entered into force by signature, without this being expressly provided for, this was probably because of some of the facts which were stated above sometimes to indicate an intention to dispense with ratification.³ If these facts were to be interpreted in a very liberal fashion it is not improbable that something which the parties have done or said without any particular consideration in mind might be regarded as evidence of an intention to dispense with ratification.⁴ Furthermore, there will probably remain some treaties where doubts as to the mode of entry into force will arise for the reason that the facts which possibly constitute evidence of the intentions of the parties are inconclusive or are contradictory. These treaties, according to the Harvard rule, would be subject to ratification, whereas the modern practice of States tends to show that they would more likely be intended to come into force by signature.⁵

¹ *American Journal of International Law*, 29 (1935), Suppl., p. 769. ² Ibid. (italics added)

³ Thus, for instance, the Agreement of 20 June 1950 of the Netherlands with the International Refugee Organization relating to the care to be given to forty refugees resident in the Netherlands (*U.N.T.S.* 76 (1950), p. 56) has been included among those instruments which were stated above (pp. 360 and 367) to contain no express clause nor any clear implication as to the mode by which they were to enter into force. Professor Lauterpacht finds that in this Agreement the position as to ratification remained partly undetermined, for this Agreement, in view of the urgency of its execution, probably falls within the category of agreements not requiring ratification having regard to 'attendant circumstances' (*Report on the Law of Treaties* (1953), p. 72, n. 1).

⁴ Fitzmaurice, in his article 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Treaty Points', in this *Year Book*, 28 (1951), states, with regard to the interpretation of treaties: 'There are so many cases in which the dispute has arisen precisely because the parties had no intentions on the point, or none that were genuinely common. To make the issue dependent on them involves either an abortive search or an artificial construction that does *not* in fact represent their intentions' (at p. 2, n. 1).

⁵ See *supra*, pp. 366 ff. To the example there given of treaties which, without expressly or by clear implication dispensing with ratification, entered into force by signature, the following may be added: Agreement of 19 July 1941 between the United Kingdom and Trans-Jordan respecting the part of the Haifa-Baghdad Road which passes through Trans-Jordan (*U.N.T.S.* 9 (1947),

The rule formulated by the Harvard Research—and other similar rules¹—undoubtedly represent the most successful attempt to maintain ratification as the main rule while at the same time, by reference to wide exceptions, taking into account the fact that a vast number of modern treaties enter into force otherwise than by ratification, notably by signature. Yet it may be doubted whether the rule thus formulated is satisfactory. It would seem, therefore, that no satisfactory rule can be formulated unless the idea that ratification is the rule and signature the exception be abandoned. Mr. (now Sir Gerald) Fitzmaurice, writing in 1934, came to the same conclusion in suggesting that

‘the necessity for ratification is not inherent and depends in the last resort, not on any general rule, but on the intention of the parties; and that where no intention to ratify is apparent it may be assumed that none exists.’²

Dr. Mervyn Jones, who cites Sir Gerald Fitzmaurice on this point, seems to take a more guarded position.³ However, the same approach as that of Sir Gerald was adopted by Professor Brierly in his first *Report on the Law of Treaties* to the International Law Commission in 1950,⁴ and later—though only in an alternative version of the rule on ratification—by Professor Lauterpacht in his *Report* submitted to the International Law Commission in 1953.⁵ This alternative version reads:

‘Confirmation of the treaty by way of ratification is required only when the treaty so provides.’⁶

Professor Lauterpacht, in commenting upon the rule, which he formulates on the traditional pattern, asks, pertinently:

‘... if there must be a rule, if the cases in which the parties in effect fail to regulate the matter are conspicuous for their rarity, and if the rule as stated above provides for so many exceptions as almost to be transformed into a principle opposed to that which seemingly underlies it, is it not preferable to lay down, as expressing either the existing or the desirable law, that no ratification is required unless the parties provide for it. expressly?’⁷

p. 381). This Treaty took the form of an Agreement between His Britannic Majesty and His Highness the Amir of Trans-Jordan; Agreement of 19 July 1941 between the United Kingdom and Trans-Jordan concerning the Trans-Jordan Oil Mining Law (*ibid.*, p. 389). This Treaty, too, took the form of an Agreement between His Britannic Majesty and His Highness the Amir of Trans-Jordan; Agreement of 20 December 1951 between Norway, Denmark and Sweden concerning economic guarantees for certain airlines (*S.Ö.* 1951, p. 471). This Treaty took the form of an Agreement between His Majesty the King of Norway, His Majesty the King of Denmark, and His Majesty the King of Sweden. See also the Agreement of 20 December 1951 between the same parties in the same form—but by an express clause made subject to ratification—concerning co-operation in air traffic (*ibid.* 1952, No. 44).

¹ See *supra*, p. 377, n. 3.

² Fitzmaurice, ‘Do Treaties Need Ratification?’ in this *Year Book*, 15 (1934), p. 129. Cf. the following statement by Basdevant: ‘Ce sont des considérations d’ordre pratique qui ont conduit à voir dans la ratification un élément de validité du traité. Mais il n’y a pas là une nécessité juridique’ (*op. cit.*, p. 576).

³ *Op. cit.*, pp. 132 and 133.

⁴ U.N. Doc. A/CN.4/63.

⁵ *Report on the Law of Treaties* (1953), p. 77.

⁶ U.N. Doc. A/CN.4/23, p. 27.

⁷ *Ibid.*, p. 67.

He then comes to the conclusion that:

'... it does not matter very much which solution is accepted—although purely practical considerations counsel the adoption of a rule which is precise and clear.'¹

It is obvious that Professor Lauterpacht's alternative formulation of the rule does not lack clarity. However, Professor Lauterpacht seems to have hesitated whether his formulation expressed the existing or the desirable law. Considering that among modern treaties some may still be found in which the parties have only implied—though clearly implied—their intentions to become bound by ratification, it would seem that Mr. Fitzmaurice's formulation—quoted above—approximates more closely to the practice of States. This formulation takes into account the fact that in the present practice of States the treaties in which there is no clear evidence, express or implied, of the parties' intentions as to the mode of entry into force, almost without exception enter into force by signature.

VI. *Conclusion*

All formulations of the rule of the mode of entry into force of treaties make the issue dependent in the first place upon evidence of the intentions of the parties. The examination of the present practice of States has shown that whenever States intend to bring treaties into force by some procedure other than signature, their intention is evidenced by express provisions or by cogent implication. The same applies usually to cases where States intend to bring treaties into force by signature. The treaties in which the intentions of the parties as to the mode of entry into force are *not* thus evidenced are not numerous; but they cannot all be said to be of 'minor importance'. They are not all in the form of exchanges of notes, nor do they all go under the names of 'modus vivendi', 'arrangement', or 'additional protocol'. Neither are they all concluded without the use of formal Full Powers. What is common to these treaties is that—almost without exception—the parties intended to become bound by signature. The fact that that intention has not been expressed in any way can only be explained by the existence of a general belief among those who concluded these treaties that, in the absence of express or clearly implied intentions to the contrary, treaties—by virtue of a rule of international law—enter into force by signature. Courts have not denied the existence of such a rule even if they have not clearly confirmed it. It would appear therefore that, as the final conclusion of the present article concerning the mode of entry into force of treaties, the following rule emerges, namely, that treaties enter into force in accordance with the parties' express or clearly implied intentions, or, in case of doubt, by signature.

¹ *Report on the Law of Treaties* (1953), p. 80.

THE LEGAL CHARACTER OF INTERNATIONAL AGREEMENTS

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I. *The definition of 'international agreement'*

THERE is a paradox in the fact that in the negotiation of international agreements the politicians and officials, on the one hand, ask to have them written out in 'legal language', while their legal advisers, on the other, assure them that the form in which agreements are cast has no great significance. The former often mean by 'legal language' nothing more than that the text is to be clear and precise. But they may on other occasions mean by that expression what it says, namely, that the agreement is to be expressed as a legal instrument; while the crafty or cynical may even hope that into an agreement dressed in legal language obscurity may enter, veiling particular disagreements unresolved in negotiation. For international agreements are peculiar, and differ generally here from private law contracts, in that their provisions may sometimes be expressions not of agreement but of artfully formulated disagreement.¹

The object of this article is to inquire whether the variety of forms in which international agreements are cast, together with the principle that no particular form is necessary to their validity, does not tend to obscure their legal character and lead often to the use of forms inappropriate to the agreement and so to difficulties in interpretation. It will be suggested that, while mere formalism is to be avoided, a change in practice towards greater care for the form of international agreements is desirable. Form here includes both the language and special terms used in drafting the agreement.

However, we cannot choose the form and terminology appropriate to a particular agreement until we know what kind of an agreement it is, and in particular whether it has a legal character. A rough classification of international agreements must therefore be attempted. They are in the literal sense agreements between parties belonging to different countries, where 'belonging to' expresses a relationship of status. This is, of course, not a definition of 'international agreement' according to the common usage of that term, nor is it a proposed final definition; it only makes a start at sorting out the kinds of international agreement in order to find which are

¹ See Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties', in this *Year Book*, 26 (1949), p. 48, at p. 78. The writer of the present article is much indebted to Professor Lauterpacht for his help and criticism on a number of points.

of direct interest to international law. The parties to international agreements, conceived in this broad and literal sense, will be natural persons, or legal persons including States, their Governments and governmental agencies, or associations of them. International agreements will then be either agreements between States or Governments or associations of them, which we may call inter-State agreements; agreements between States or Governments or associations of them and private legal or natural persons belonging to other countries, which we may call State contracts;¹ and finally, agreements between private legal and natural persons belonging to different countries or jurisdictions. We can exclude the last class immediately from the present discussion, not on the ground that agreements in this class are to be construed and enforced not under public international law but by the appropriate rules of private international law, but because they are not 'international agreements' as the term is understood in State practice and common usage; though it is to be noted that Dr. Cheshire has not hesitated to describe an agreement of this kind as an 'international contract', in the sense that 'it impinges upon two or more different systems of law'.²

There are then two classes of international agreement, inter-State agreements and State contracts, which call for further discussion in the framework of international law. It is not intended by this nomenclature, and particularly the term 'State contracts', to prejudge the question whether agreements in these classes have legal character, for this is to be considered below. But it may be remarked in passing that most State contracts are in fact legal instruments, being nearer in purpose, subject-matter and form to private law contracts than inter-State agreements; though it is sometimes argued that a State contract is concluded by the State party to it as an act of sovereignty, which presumably entails that it is not enforceable at law.

At this point it may be helpful to look at the definitions and terminology used in the Draft Articles, with comments and notes upon them, which form the *Report on the Law of Treaties*³ by Professor Lauterpacht as Special Rapporteur to the International Law Commission. The first three Draft Articles read as follows:

Article 1

Essential Requirements of a Treaty

Treaties are agreements between States, including organizations of States, intended to create legal rights and obligations of the parties.

¹ See Mann, 'The Law Governing State Contracts', in this *Year Book*, 21 (1944), p. 11.

² David Murray Lecture, Glasgow, 1948, p. 3. The lecture is entitled 'International Contracts'.

³ U.N. Document A/CN.4/63 (24 March 1953).

Article 2

Form and Designation of a Treaty

Agreements, as defined in Article 1, constitute treaties regardless of their form and designation.

Article 3

The Law Governing Treaties

In the absence of any contrary provisions laid down by the parties and not inconsistent with overriding principles of international law, the conditions of the validity of treaties, their execution, interpretation and termination are governed by international custom and, in appropriate cases, by general principles of law recognized by civilized nations.

(There is an alternative version of Draft Article 2 which does not immediately concern us.)

Article 1 sets out a definition of the term 'treaties', though it does not, despite the language of Article 2, define 'agreements'. The combined effect of Draft Articles 1 and 2 is to limit treaties to agreements between States or organizations of States, that is, to inter-State agreements in our rough classification. The reason given for this limitation is that 'States only—acting either individually or in association—are the normal subjects of international intercourse and of international law';¹ while Draft Article 10 provides:

Capacity of the Parties

An instrument is void as a treaty if concluded in disregard of the international limitations upon the capacity of the parties to conclude treaties.

This deserves study. Articles 1 and 10 when read together seem to be saying this: As a matter of definition in this code of Draft Articles, only agreements between States or organizations of States are treaties, and whether a party purporting to contract has the capacity to conclude a treaty is a question of international law; but whatever other limitation there may be upon the capacity of such a party, it must at least be a State.

This is all consistent with the definition of 'treaties' in Article 1. But can the fact—if it be a fact—that only States are subjects of international law, serve as a *reason* for limiting treaties to inter-State agreements? For if only States are subjects of international law, then there are no subjects of international law which are not States or organizations of States, and the term 'subjects of international law' could be substituted for 'States or organizations of States' in Article 1 without any alteration of the sense. In other words, the statement that only States are the subjects of international law is an analytical proposition about the word 'State'; it tells us in part how to use the word and further in this context tells us that the definition of

¹ *Report*, loc. cit., p. 16.

treaties in Article 1 can be expressed in two ways, using either the word 'States' or the words 'subjects of international law'. But the statement does not and it seems cannot tell us *why* treaties should be limited to agreements between States. It explains the use of terms in the definition but not the definition itself.

The explanation of the language of the *Report* may be that treaties are to be regarded, for the purposes of the Draft Articles, as creating relations of international law, and of international law only, between the contracting parties; in other words, the term 'international' should be inserted or understood in front of 'legal relations' in Article 1. Treaties would then be agreements creating relations of international law between States or organizations of States. This reading has some support in the comment on Article 3, where it is indicated that there are 'overriding principles of international law', from which States cannot, in concluding treaties, escape.

'The binding force of treaties [says the comment on this Article¹] is independent of the will of the States which conclude them in the exercise of their sovereignty. Their binding force and other basic conditions of their operation are grounded in customary international law. While, therefore, States are free to shape their treaty relations and the conditions of their performance in accordance with their will, they can do so only subject to the overriding principles of international law, the general principles of law and principles of good faith.'

This comment suggests that every agreement between States, intended to create legal relations, attracts as it were principles of international law, so that every treaty is a creature of international law. As between States there would then be an irrebuttable presumption of an intention to create international legal relations in the making of any agreement between them. But Draft Article 3 does not seem to go so far as this; for not only does it, in its opening lines, allow States to subject their agreements with one another to municipal law, but in its reference there to international law it is concerned with illegality of object. It is saying in effect that the parties may agree to exclude any or all the rules of international law, provided that the exclusion does not itself involve a breach of international law; and an international agreement can plainly have an illegal object even though the parties may not have intended to create legal relations at all. If this reasoning is correct, Article 3 itself does not support the insertion of 'international' before 'legal relations' in Article 1.

It may be that some of these difficulties of interpretation of the Draft Articles flow from the choice of the word 'treaty' as the generic name of the international agreements with which they are in fact dealing. The word 'treaty' has never been exactly defined either in State practice or common usage, but it has been traditionally used to denote solemn legal compacts

¹ *Report*, loc. cit., pp. 48-49.

between States of a political or commercial character; and Article 102 of the Charter of the United Nations, in speaking of 'treaties and international agreements', acknowledges some special usage of the term. 'Treaty' is indeed a charismatic word with an ancestral power far greater than the grammatical and dull 'international agreement'. Whatever is entitled a treaty suggests itself strongly as an instrument of international law and discourages inquiry into its true character. Articles 1 and 2 seem to have been drafted to some extent under this influence, with the results that a satisfactory basis for distinguishing State contracts from inter-State agreements and excluding them from the class of international agreements, to be dealt with in the code, is not established; and that the word 'treaty' has to bear in the Draft Articles a wider meaning than tradition or common usage would allow, for arrangements, exchanges of notes, and even agreed minutes are all 'treaties'.¹ Should not this departure be signalled by qualifying words in Article 1 such as 'Treaties, as understood in this Code, are . . .'?

II. *Tests of the legal character of international agreements*

It has been suggested in what has been said so far that the 'legal relations' intended by the parties in Draft Article 1 of the *Report* should not be limited to relations of international law. The present article will go further to suggest that there is no presumption that States, in concluding an international agreement, intend to create legal relations at all, and that this intention must be clearly manifested before a legal character is attributed to the agreement. It should perhaps be emphasized here that what follows in the rest of this article is very largely written *de lege ferenda*; this is especially true of the tests of intention to create legal relations suggested below. It is pertinent to ask two questions of any inter-State agreement or State contract: Did the parties intend that the agreement should create or declare legal rights and obligations between them? If so, what is the proper law of the agreement? It is part of the meaning of 'contract' or 'agreement', considered as legal terms, that the parties to them intend to create legal rights and duties. If this intention is lacking, there is no 'act in the law',² though there may still be an agreement in the eyes of the moralist or sociologist. So in *Rose and Frank Co. v. J. R. Crompton Bros. Ltd.*,³ Atkin L.J. said:

'To create a contract there must be a common intention of the parties to enter into legal obligations. . . . Such an intention ordinarily will be inferred when parties enter into an agreement which in other respects conforms to the rules of law as to the formation of contracts. It may be negatived impliedly by the nature of the agreed promise or promises, . . .'

¹ *Report*, loc. cit., p. 35.

² Pollock-Winfield, *Law of Contract*, 13th ed. (1950), p. 3.

³ [1923] 2 K.B. 261, at p. 293.

Scrutton L.J. said:

'I can see no reason why, even in business matters, the parties should not intend to rely on each other's good faith and honour, and to exclude all idea of settling disputes by any outside intervention, with the accompanying necessity of expressing themselves so precisely that outsiders may have no difficulty in understanding what they mean.'¹

In *Balfour v. Balfour*² Atkin L.J. had also said:

'[Such agreements] are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception of the arrangement, never intended that they should be sued upon.'

Two rules are enunciated in these passages: first, the intention to create legal relations is an intention to create rights and duties which may be declared or enforced in a court of law. Secondly, there is a presumption that parties, who have expressed their agreement consistently with the rules for the formation of contracts, intend to create legal relations between them. The first rule seems to be part of many systems of municipal law and is perhaps accepted generally. For example, it is to be found in Roman Law,³ the German Civil Code,⁴ the Italian Civil Code,⁵ and the Soviet Civil Code.⁶ It is submitted that the first rule is equally applicable to international agreements⁷ but that the second rule is not so, for there are compelling reasons against any presumption that legal relations are intended, arising from the bare fact of the conclusion of an inter-State agreement. In the first place, States and Governments differ greatly from individuals in the type of business they transact by means of inter-State agreements; the whole field of joint administrative and technical enterprise between Governments resembles the co-operation between the separate departments of a single Government rather than the contractual business relations of individuals; and just as joint undertakings between, for example, the Treasury and the War Office are removed from the cognizance of the courts, not least because of the manifest lack of any intention that they should constitute legal obligations or that the agreed minutes or memoranda in which they are embodied should be regarded as contractual instruments, so it would be both unrealistic and inconvenient to treat international

¹ At p. 288.

² [1919] 2 K.B. 571.

³ Debitor intelligitur is a quo invito pecunia *exigi* potest: *Dig.* 50. 16. 108; *Obligatio est iuris vinculum quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura: Inst.* 3. 13.

⁴ 1900, § 241: By virtue of an obligation, the creditor is entitled to *demand* a performance from the debtor. Performance may consist of an act of omission.

⁵ 1942, § 1173: Obligations arise from contracts, wrongful acts, or any other acts or facts which are capable of producing obligations *under law*.

⁶ § 26: Legal transactions, that is to say, acts intended to establish, modify or terminate civil legal relations may be unilateral or bilateral (contracts); § 107: By virtue of an obligation the creditor has the right to *claim from the debtor the performance* of a specific act, in particular, to deliver things or to pay money, or to abstain from an act.

⁷ See *Report*, loc. cit., Draft Article 1.

agreements having a similar scope and object as being legally binding upon the parties.

Secondly, the principles, on the one hand, of the interpretation of agreements between States in favour of their liberty of action and, on the other hand, of the necessity of the consent of States to the assumption by international tribunals of jurisdiction over them, raise the contrary presumption that an inter-State agreement does not create for the parties obligations enforceable by judicial process, unless such an intention is clearly expressed or necessarily to be inferred from the terms of the agreement. However, in his Dissenting Opinion on the *Status of South-West Africa*,¹ Judge Read said:

'It is sufficient for the present purposes, to state that an 'arrangement agreed between' the United Nations and the Union [of South Africa] necessarily included two elements: a meeting of minds, and an intention to constitute a legal obligation.'

The use of the word 'necessarily' here raises the question whether in the view of Judge Read the bare fact of agreement between international persons raises a presumption that legal relations are intended to be created between them. In this case the question was how far a number of unilateral statements and communications by South Africa constituted binding arrangements for a clarification of the legal status of South-West Africa; since the legal status of the territory was in issue, it followed that any arrangement concluded between South Africa and the United Nations affecting it would have had legal consequences. It is submitted with respect that Judge Read's words, and particularly the word 'necessarily', are to be read in this sense. Where he differed from the Court was on the question of fact whether South Africa's various statements and communications to the United Nations did or did not establish such an 'arrangement'.

How, then, is the intention² of the parties to be legally bound by an international agreement manifested? A number of tests suggest themselves. First, have the parties included in the agreement provision for the settlement by compulsory judicial process of disputes arising out of it? Secondly, have they both accepted the jurisdiction of the International Court of Justice under Article 36 of its Statute in terms which would give the Court jurisdiction over any such dispute? Third, has the agreement been registered under Article 102 of the Charter of the United Nations or Article 18 of the Covenant of the League of Nations? Fourth, is there an intention declared, or to be deduced from the subject-matter of the agreement, that the agreement or particular provisions of it are to be governed by public

¹ *I.C.J. Reports*, 1950, pp. 170-1.

² For the problem of discovery of the intentions of the parties to international agreements see Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation', in this *Year Book*, 28 (1951), pp. 1-28; and Lauterpacht, loc. cit., p. 76.

international law, or by a specified system of municipal law, or by the general principles of law recognized by civilized nations?

The first test appears to be decisive. But the requirements that the process of settlement be judicial and compulsory must be fully present. That the process must be judicial, in that the dispute as to the interpretation or application of the agreement must be settled by an impartial outsider after hearing evidence, if necessary, and the opinions of all parties, seems to be a principle recognized in the English court decisions and the foreign codes already referred to. The process of settlement must be compulsory in the sense that the dispute is justiciable at the instance of any party to the agreement and that the decision, given in settlement of the dispute, is binding on the parties. This is obvious; for there could otherwise be no relationship of obligation. Therefore the settlement of disputes, arising out of international agreements, by diplomatic exchanges or other negotiations between Governments is not a mode of settlement from which it can be inferred that the parties contemplate a legal relationship under the agreement.

The second test is a complicated extension of the first; and it is applicable to the case where there is no provision in the agreement itself for the judicial settlement of disputes. If the parties to such an agreement have accepted the jurisdiction of the Court under Article 36 of its Statute, the question may be asked whether there is any implied intention to create legal relations under the agreement. The implication will arise, if at all, only if, on the one hand, there is no provision in the agreement itself ousting the jurisdiction of the Court,¹ and, on the other hand, there is no reservation in the instruments of acceptance of the Court's jurisdiction which would exclude disputes arising out of the agreement in question. Where there is a disputes clause in the agreement and this provides for the settlement of disputes by diplomatic or analogous process, then the jurisdiction of the Court must be taken to be ousted and cannot be invoked under Article 36. Again, if the agreement as a whole falls into a class, such that any dispute arising out of it would be a dispute excluded by express reservation from the scope of a country's acceptance of the Court's jurisdiction, then no implication of intention to create legal relations can arise from that acceptance; an example would be any dispute arising out of any agreement between the United Kingdom and another member of the Commonwealth.² The position would be the same if the dispute in question was expressly excluded by the terms of acceptance.

¹ As, for example, in the European Convention on Human Rights, 1953, Article 62.

² The United Kingdom Declaration of 28 February 1940 excepts, *inter alia*, 'disputes with the Government of any other Member of the League which is a Member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the Parties have agreed or shall agree'.

But in cases where these obstacles do not appear, there seems to be no reason why the implication should not arise. In other words, the acceptance of the Court's jurisdiction under Article 36 by any two or more parties to the Statute has the consequence that any agreements concluded between them are, subject to the exceptions suggested above, established as agreements of legal obligation. This conclusion seems to be consistent with the policy of Article 36 of the Statute, which is to extend the compulsory judicial settlement of disputes as widely as possible. But a difficulty remains. Suppose that a dispute arises between two States over the application of an agreement made by them, and that, as far as concerns the date when the dispute arose and the character of the agreement, the dispute is within the terms of the acceptances by both States of the Court's jurisdiction. If one State refers the dispute to the Court by application, and the other State takes the preliminary objection that the Court has no jurisdiction on the ground that the agreement in question did not, and was not intended by the parties to, create legal relations, how is this objection to be determined? Since the Court's jurisdiction rests if at all upon the acceptances by the parties under Article 36 and not upon the agreement in question, there is not here the logical difficulty that one party is seeking to establish jurisdiction under an agreement the very existence of which the other party denies. Further, where an objection to the jurisdiction of the Court is taken, the Court is to determine it.¹ It follows, then, that the Court could decide the question whether the agreement between the parties had created legal relations and, in particular, whether that effect had been brought about by their acceptance of the jurisdiction of the Court under Article 36. It is submitted that the Court should decide in favour of jurisdiction.

The third test is inconclusive and therefore useless as far as Article 102 of the Charter of the United Nations goes. For under this Article² any 'treaty or international agreement, whatever its form and descriptive name, entered into by one or more Members of the United Nations after October 24, 1945 . . . shall as soon as possible be registered with the Secretariat'; while Article 102 itself provides that such an agreement may not be invoked by a party before any organ of the United Nations without prior registration. The test of registration is inconclusive for two reasons. First, neither Article 102 nor the regulations made under it define 'treaty' or 'international agreement' and do not require that such instruments shall be intended to create legal relations. Article 18 of the League Covenant, as explained by a memorandum of the Secretary-General approved by the League Council,³ was more precise and more comprehensive. The memorandum laid it down

¹ Article 36 (6) of the Statute.

² As elaborated by General Assembly Resolution 97 (I): U.N. Doc. A/64, Add. 1.

³ *League of Nations Treaty Series*, vol. 1, p. 9.

that 'not only any formal treaty of whatsoever character and any international convention, but also any other international engagement or act by which nations or their governments intend to establish legal obligations between themselves and another State, nation or government' must be registered. In the result, registration of an agreement under Article 18 of the Covenant implied an intention to create legal relations; and indeed in the absence of registration an agreement was a nullity.

The position under Article 102 is not so clear.¹ For the expression 'treaty or international agreement' is wide enough to include agreements not creating legal relations; and indeed Article 102 and the regulations made under it are for this reason likely to be more effective than the corresponding provisions of the Covenant of the League for securing the real object of registration, which is to prevent as far as possible the conclusion of secret agreements. For these agreements are by their very nature unlikely to satisfy the tests of intention to create legal relations here suggested. But there is a second reason for doubting the effect of Article 102, which is this, that agreements which have not been duly registered are not declared void but are of limited applicability before the organs of the United Nations. It does not follow therefore from the fact of registration under Article 102 that the parties intended to create legal relations by the agreement or that they intended to rely on it before the International Court (so as to invite the second test) rather than before other organs of the United Nations, which do not necessarily consider agreements in the light of the law.

The fourth test is, like the first, decisive. Typical agreements which satisfy this test are those establishing the constitutions of international organizations; those creating rights and obligations enforceable under private law, such as agreements of leases of land, for the sale of goods, or for taxation relief; and those operating within the framework of accepted rules of international law or State practice, such as consular conventions.

III. *Limits of the presumption of legal obligation*

Certain provisions in international agreements appear to negative any intention to create legal relations. These are provisions which in one way or another leave it to the parties themselves to determine the extent of the obligations they have assumed and the mode of performance. For example, an undertaking qualified by the words 'subject to the law in force' would, it is submitted, create no international obligation at all; for it would enable any party to appeal successfully to municipal law against any attempt by

¹ See an interesting discussion of the whole subject by Brandon, 'Analysis of the terms "treaty" and "international agreement" for the purposes of Article 102', in *American Journal of International Law*, 47 (1953), p. 49.

another party to enforce the obligation.¹ These qualifying words were more than once suggested by the Soviet Union and like-minded countries in debates upon clauses of the draft Human Rights Covenant: their inclusion would make nonsense of the Covenant. Similarly, it is doubtful whether undertakings 'to use best endeavours' or 'to take all possible measures' can in most cases amount to more than declarations of policy, or of goodwill towards the objects of the agreement. A blunt reservation to the parties of the right to determine the extent and mode of the performance of their obligations is to be found in Article 1 of the North Atlantic Treaty. Each party agrees to assist any other party, in case of an attack upon it, 'by such action as it deems necessary'. There has been some controversy concerning the effect of these words. On the point at issue Professor Lauterpacht says: 'The fact that the interested State is the sole judge of the existence of the obligation is, while otherwise of considerable importance, irrelevant for the determination of the legal character of the instrument.' After this general observation, he cites the words quoted from Article 1 of the North Atlantic Treaty and analogous provisions in the General Treaty for the Renunciation of War of 27 August 1928, and concludes: 'The freedom of action, thus claimed, refers only to the decision called for by the exigencies of the situation and permitting of no delay. As in other cases of self-defence it does not exclude the final impartial determination of the legitimacy of the action thus taken. There is in the instruments of this description no ground for questioning their legal character as treaties.'²

If this passage is saying that the presence in an agreement of an undertaking, the extent of which is determinable by each party for itself, does not prevent the agreement from being treated as a whole as a legal instrument, this is doubtless true if there are legal obligations created by the agreement apart from the undertaking in question. But if it is saying what at any rate the first sentence quoted seems to be saying, it is submitted with respect that such a principle is in itself doubtful, particularly in the light of a passage which appears later in the *Report*. In this passage, after raising the question whether the absence of a 'true treaty relationship' can be implied by the form in which an inter-State agreement is expressed, the learned Rapporteur makes a statement which seems directed not only to problems of form but to the legal character of agreements generally. He says: 'In the event of a dispute on the subject, it must properly be a question for judicial determination whether an instrument, whatever its description, is in fact intended to create legal rights and obligations between the parties and as coming within the category of treaties.'³

¹ See *Wyers v. Arnold*, decided by the United States Supreme Court of Missouri (*Annual Digest and Reports of Public International Law Cases*, 1941-2, Case No. 126, at p. 401).

² *Report*, loc. cit., p. 27.

³ *Ibid.*

The principle enunciated can be tested in the following way: Suppose that an agreement between States contains only one undertaking, it being the same for each of the parties; and suppose it is so worded that each party is to be the sole judge as to when and to what extent obligations arise for it from that undertaking. How can the question whether or not the undertaking imposes legal obligations on the parties be one for judicial determination? For an obligation cannot be properly called a legal obligation unless its existence and extent are determinable judicially, that is, according to general principles of law; and if the agreement has provided in advance that the parties are to be the judges, each for itself, then *cadit quaestio*. To put it another way, since reference of the question to judicial determination might result in the tribunal deciding that the undertaking *did* impose legal obligations upon the parties, it would be open to a recalcitrant party to object to the jurisdiction of the tribunal or to ignore its decision, by arguing that it was precisely the possibility of such a decision that was excluded by the terms of the agreement leaving the decision to the parties; and such an objection to the jurisdiction of the tribunal would, it is submitted, be well founded.

It may be that an agreement is so drafted that only the extent of an obligation, but not its existence, is removed from the field of judicial review. It is possible that the question whether there is any legal obligation imposed by Article 5 of the North Atlantic Treaty is determinable, at least as between some of the parties, by the International Court of Justice; for the *casus foederis*—armed attack against one or more of the parties in Europe or North America—is defined by the Article itself. But it appears from the remainder of the Article that the answer to this question would be negative; for it is provided that ‘if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area . . .’. Surely the whole point of using the words ‘as it deems necessary’, instead of the simple and obvious ‘as is necessary’, was to give to each party freedom of action, that is to say, freedom from *strict legal* responsibility, in a situation which could not be wholly foreseen; and the practical reason is not far to seek when the constitutional limits upon the war-making powers of certain government members of N.A.T.O. are taken into account. The history of the Article, as far as United States participation goes, shows that no automatic obligation to go to war was intended. Senator Vandenberg, speaking in the Senate debate, said that he ‘would expect that the complete right of decision respecting the type of contribution to be made . . .

in the presence of an armed attack would remain exclusively with each signatory'.¹

Even a brief inspection of international agreements registered or filed with the United Nations reveals further instructive examples of the problem of the intention to create legal relations, and a few agreements chosen at random will illustrate the argument.

First, there are agreements concerned with the general regulation of inter-State relations; they are political agreements in the broad sense, though some have a legal character while others do not. The Treaty between the United Kingdom and the Provisional Government of Burma regarding the Recognition of Burmese Independence and Related Matters, of 17 October 1947,² contains a clause directing that disputes arising out of the Treaty shall be referred to the International Court, and so satisfies the first test suggested above. But even in the absence of such a clause, the subject-matter of the Treaty shows a clear intention to create rights and obligations under international law and municipal law. In Article 1 the United Kingdom recognizes Burma as a sovereign independent State; Article 2 provides for the devolution upon Burma of treaty rights and obligations formerly assumed in respect of Burma by the United Kingdom; Article 3 provides for the declaration of alienage from British nationality by Burmese citizens, as defined under Burmese legislation; in Article 5 Burma reaffirms her duty to pay certain pensions and other dues to former officials of government; and Article 13 reserves all obligations arising under the United Nations Charter.

Again, the Treaty of Friendship between the Philippines and Spain, of 27 October 1947,³ though it contains no settlement of disputes clause, plainly satisfies the fourth test suggested. It is in part a treaty of establishment, guaranteeing reciprocal rights to the nationals of the parties (Article VI) and providing for the exchange of diplomatic representatives (Article IV) and of consuls, who are to be accorded all immunities and privileges customarily given under international law (Article V); and it is in part an arbitration treaty, which establishes a Permanent Conciliation Commission and an Arbitration Court for the settlement of future disputes arising between the contracting parties (Article II).

An example of a political agreement which does not satisfy any of the tests suggested is to be found in the Declaration of Friendship and Collaboration signed by Italy and Ecuador on 24 August 1949.⁴ It contains no disputes clause; Italy is not a party to the Statute of the International Court; and the four Articles comprising the Declaration could not be

¹ Cited by Salvin, *The North Atlantic Pact* (International Conciliation Pamphlet No. 451 (1949)), p. 411.

² *United Nations Treaty Series*, vol. 70, p. 184.

³ *Ibid.*, p. 134.

⁴ *Ibid.*, vol. 72, p. 38.

construed in any sense permitting legal enforcement. They declare general principles of 'peaceful good neighbourliness', the preservation by the parties of 'the common heritage of their Latin culture . . . and Christian tradition', and the need to establish and develop cultural relations. The title 'Declaration' suggests that the parties were deliberately not making a legal instrument, and the form in which the Declaration is cast seems apt and correct for its purpose.

But of the important Declaration regarding the Defeat of Germany and the Assumption of Supreme Authority in Germany, of 5 June 1945, it may be asked whether it is an 'international agreement' at all. The four declarants describe themselves as 'acting by authority of their respective governments and in the interests of the United Nations';¹ the Declaration is in part an act constituting the government of Germany, in part an 'announcement of requirements' demanded of the German armed forces and German people, and in part a declaration of future policy as to Germany by which the four Governments 'will hereafter determine the boundaries of Germany . . . and the status of Germany or of any area at present being part of German territory'. There are no mutual undertakings in the Declaration between the four Governments, either express or implied, and it seems to be no more than a joint declaration of policy, made within the framework of the several and equal rights and duties of the four Governments already subsisting under international law. It is a legal instrument only to the extent that it was to have legal consequences in Germany and to form part of German constitutional law. Its registrability under Article 102 of the United Nations Charter is doubtful, though it might have been an 'engagement' for the purposes of Article 18 of the Covenant of the League.

Another class of international agreements, which would not satisfy the tests of legal character suggested, are those setting out joint administrative or technical arrangements or providing for scientific or cultural co-operation. Of the following examples to be found in the *United Nations Treaty Series*, the first three are in substance simply inter-departmental arrangements; the fourth provides for the administration of a demilitarized territory.

The Exchange of Notes Constituting an Agreement between Italy and the United Kingdom for the Recruitment of Italian Workers for Employment in Foundries in the United Kingdom, January–May 1947,² consists with its Annex of a record of conversations between representatives of the Italian Government and of the United Kingdom Ministry of Labour and National Service. It is concerned with the conditions of employment in the United Kingdom of Italian workers brought to that country and makes provision for their social welfare, insurance, trade union membership,

¹ That is, viewed severally and not as an organization, which was not yet in existence.

² *U.N.T.S.*, vol. 54, p. 132.

travel expenses and subsistence, pay, and remittances. All questions arising out of the welfare and working conditions of visiting Italian workers are to be settled directly between the Italian General Federation of Labour and the Trades Union Congress, while the nearest Italian Consul is to be informed when any Italian worker is dismissed for disciplinary reasons, this being a responsibility of his employer.

In the Agreement of 14 June 1941 between Brazil and Paraguay for the Establishment of Joint Commissions with instructions to study the problems of navigation on the River Paraguay in the territorial waters of the two countries and the creation of a combined Brazilian-Paraguayan merchant fleet,¹ although it is made subject to ratification by the competent authorities in each country, the Commissions have no functions beyond making studies, and reports with draft agreements attached, in the fields indicated in the title of the Agreement.

The Exchange of Notes of 30 April 1948 between Canada and the United States of America, constituting an Agreement relating to the improvement of certain practices for sanitary control in the shellfish industry and to the certification of shellfish shippers,² is an Agreement made in effect between the Canadian Department of National Health and Welfare and the United States Public Health Service. It provides for the joint adoption of a manual of recommended standards and practices, for the exchange of reports upon 'the degree of compliance' with these standards in each country, and for the grant where possible of facilities for inspection.

It might be supposed that these three Agreements were chosen for their unusual character; on the contrary, they are typical of scores of contemporary international agreements. It is submitted that they do not create, and were not by their authors intended to create, legal rights and obligations for the parties; and it is indeed doubtful whether in the Italy-United Kingdom Agreement and the Canada-United States Agreement the parties are States at all. Are these not working arrangements between departments of government having the same objects and status as an inter-departmental arrangement made within a single Government? Their international character seems largely irrelevant.

The Agreement between the Union of Soviet Socialist Republics and Finland concerning the Aaland Islands, of 11 October 1940,³ requires Finland to keep the Aaland Islands demilitarized (Article 1), while the Soviet Consul to be permitted to reside there is, in addition to his normal consular functions, to be 'competent to verify the fulfilment of the obligations' imposed by Article 1 and shall have the right to call for a joint investigation and report of any case of what he suspects may be a breach in order that

¹ *U.N.T.S.*, vol. 54, p. 308.

² *Ibid.*, vol. 77, p. 192.

³ *Ibid.*, vol. 67, p. 146.

the two Governments 'may take the necessary measures'. This is perhaps a marginal case, since there is, on the one hand, the creation of a negative servitude in favour of the Soviet Union while, on the other hand, there is no mode established of determination of breaches or of settlement of disputes under the Agreement which could satisfy any judicial test; the Agreement is to be administered in effect by the two Governments, with the implication that unilateral action may in certain circumstances be contemplated. The legal character of the Agreement when read as a whole is at least doubtful.

But there are two rules which are often summoned to the rescue of international agreements when other means of establishing them as legal instruments fail. These are: *pacta sunt servanda*, and the rule of *bona fides*. They are commonly described as being among the general principles of law recognized by civilized nations. Professor Lauterpacht, speaking of the type of agreement already discussed here, where each party can determine for itself the existence and extent of its obligations under the agreement, says that 'such determination must take place in accordance with the implied obligation to act in good faith', and that this involves a legal duty under the agreement.¹ But it is difficult to see how either of these rules can import legal obligations into inter-State agreements. The legal metaphysicians describe them as 'norms of superior rank' or 'hierarchically superior norms'. Whether these imposing terms are found to be helpful is largely a matter of temperament, but it is suggested here that these two rules are no more than rules of construction of agreements.

Pacta sunt servanda may be read not as a statement at all, but as a command or exhortation: it is the stern voice of duty saying 'Keep your promises', or, in particular, 'If this is a promise which you have made, keep it'. If, however, it is read not as a command but as a statement, it is important to see that it is not a statement imposing obligations either in general or in particular cases, but a statement *about* obligations; in fact, it tells us in part the meaning of the term *pactum*. For what we *mean* by calling the declared mutual intentions of the parties an agreement (*pactum*) is that the parties are held to be under a duty to perform its terms according to their tenor. Whether the agreement is legally enforceable matters not, for *pacta sunt servanda* is a statement about *all* agreements or promises. It follows that when a State undertakes a particular obligation by entering into an inter-State agreement, it does not incur two obligations—that expressed in the agreement, and a further obligation arising from the rule *pacta sunt servanda*. It incurs one obligation only, the obligation expressed in the agreement; and the function of the rule is simply to indicate the meaning of the words 'obligation' and 'agreement'.

¹ *Report*, loc. cit., p. 27.

If therefore an obligation imposed on the parties to an inter-State agreement is a legal obligation in the intention of the parties, the rule *pacta sunt servanda* adds nothing to the duty to carry it out or to its enforceability, and both duty and enforceability rest wholly upon the agreement. If, on the other hand, the obligations arising under the agreement are not, within the intention of the parties, legal obligations, then the rule works in two ways; first, while it indicates what we mean by saying that there is an agreement between the parties or that they have exchanged promises, it cannot turn the obligations arising into legal obligations. For a legal obligation differs from other obligations only in the prescribed mode of its enforcement; and the rule *pacta sunt servanda* has nothing to do with the mode of enforcement of obligations. Secondly, the rule forbids a party to the agreement to deny its obligatory force merely because it did not, and was not intended to, create legal relations between the parties. For the rule *pacta sunt servanda* may also be put in this way: To say that 'I am not bound to keep my promise'¹ is a contradiction in terms and meaningless.

The same reasoning can be applied to the *bona fides* principle, which may be stated for present purposes in this way: International agreements should be negotiated, concluded, and performed in good faith. The arbitral decisions² use the principle in two ways: first, as a standard of what is reasonable; thus parties negotiating an inter-State agreement are assumed to be acting reasonably and with serious intent, so that the terms they propose and adopt are not to be construed in a sense which would make them contradictory or frivolous; secondly, the performance of inter-State agreements must be adequate to their terms; they must be performed according to the spirit rather than the letter of their terms; a party must not be evasive and must not seek by literal and narrow constructions to discharge his duty with half-performance, or to overreach another party. The courts will lean against such constructions:

'For as thou urgest justice, be assured
Thou shalt have justice more than thou desirest.'³

Of these two uses of the principle, only the second seems to be in accord with the proper meaning of *bona fides*; for the first is really an application of the concept, familiar in the common law, of the reasonable man. In its proper use the rule of good faith is no more than a command or exhortation to keep promises *in full*; or it is a statement about obligations to the effect that they must be undertaken and performed to the full intent of the parties to the agreement from which they arise. Again, the obligation to act in good

¹ Though this proposition must be sharply distinguished from propositions of the form 'I am not bound to keep my promises, *if* . . . [e.g. circumstances change]', which are of a different logical order.

² For a summary see Cheng, *General Principles of Law* (1953), pp. 106 ff.

³ Portia speaks: *The Merchant of Venice*, Act IV, Scene I.

faith is not an additional obligation, which the parties to an inter-State agreement incur and which can convert non-legal into legal obligations. Like *pacta sunt servanda*, it does not of itself impose any obligation under international law; it is simply a statement about obligations. Both principles are in fact rules of construction.

But there is a passage in the reports of the International Court which might be taken to suggest that the rule of good faith imposes a legal obligation, and that States can be placed under a legal obligation to act in good faith over and above obligations which may have been assumed by them in international agreements. In the Advisory Opinion in the (*First*) *Admissions* case Judges Basdevant, McNair, Read, and Winiarski said in their Joint Dissenting Opinion that there was not an unlimited freedom for a State to choose the political considerations to guide it to a decision under Article 4 of the Charter: 'It must use this power in good faith in accordance with the Purposes and Principles of the Organization and in such a manner as not to involve any breach of the Charter.'¹ The rule of good faith is here no more than a rule for construing correctly and fully Articles 1, 2, and 4 of the Charter; the words 'in good faith' are, it is respectfully submitted, unnecessary because they *mean* 'in accordance with the Purposes [&c.]'. In other words, the rule of good faith indicates how Article 4 is to be construed and what the extent is of the obligations of Members under that Article; but to act in good faith is not itself one of those obligations.

But while the two rules of *pacta sunt servanda* and *bona fides* cannot render agreements legally enforceable which are not made so by their own terms, these rules point to the existence of inter-State agreements of political obligation, which are not enforceable by judicial process but which are not less binding upon the parties. To return for a moment to Article 5 of the North Atlantic Treaty: the Treaty is an arrangement for the defence of the Atlantic and associated communities. Each party is given a margin of freedom for a political and strategic judgment upon any armed attack which may take place; Article 5, construed by the rule of good faith, requires that that judgment be exercised so as to give full effect to the purpose of the whole arrangement, which is the defence of the Atlantic community. It has already been suggested that Article 5 does not impose a legal obligation on the parties; and it is not easy to see what the practical consequences of regarding it as a legal obligation would be. It is inconceivable that the members of N.A.T.O. would, either in the crisis or post-mortem, seek or apply a legal interpretation of Article 5. But that it is a political obligation is plain, and the sanction against its breach is plain. Political obligations stand in the same relation to legal obligations, arising under inter-State agreements, as moral obligations between individuals

¹ *I.C.J. Reports*, 1948, pp. 91-93.

stand to private law contracts. International community life can be carried on only if common declarations of policy and agreements for the solution of common administrative and technical problems are adhered to and carried out. To the extent that they are broken or disregarded, international order breaks down. Their fulfilment is what international order means, since *universum genus humanum natura est unitum ad certum finem*.¹

IV. *The proper law of international agreements*

We come now to the second question, namely, what is the proper law of an international agreement? For present purposes it is perhaps sufficient to suggest that there are three bodies of law to which an international agreement may be subject: the rules of public international law, the general principles of law recognized by civilized nations, and some specific system of municipal law; that whether an international agreement or some of its terms are governed by municipal law is a matter of the declared intention of the parties; that there are limitations on the capacity of parties to subject their agreement to the rules of public international law; and that, where the parties have not directly or indirectly shown their intentions as to the governing law, the rules of public international law will govern inter-State agreements, while State contracts² will be governed by the general principles of law. Two points arise here. First, the intention of the parties that a particular system of municipal law shall govern is not necessarily shown by their use of terms of art associated with that system: so the use of the expression *biens meubles* in a resolution of the Council of the League drawn up in French was held by the German Supreme Court to signify what the German Civil Code meant by movable things, for 'it must depend on the circumstances of each case how terms of private law employed in declarations of the League of Nations should be interpreted'; and in that case the Court held that German private law governed.³ This principle is, it is submitted, of general application, and tribunals should seek for the real meaning of terms of art taken from municipal law into an international context and not localize them in the system from which they come. But caution should be used in drafting international agreements that technical legal

¹ Thomasius, cited by Gierke, § 18, Note 174 (Barker's edition, vol. ii, p. 394). In the language of Kant, international political obligations are hypothetical imperatives; they must be observed and carried out if international order is to be maintained and extended.

² See Mann, loc. cit., p. 11.

³ *Von Donnersmarck v. Landesversicherungsanstalt, Schlesien*, decided by the German Supreme Court for Civil Matters (*Annual Digest*, 1931-2, Case No. 207). Contrast the *Caselli Claim* (United States-Panama Claims Commission) (*ibid.*, 1933-4, Case No. 195), where the meaning of 'private property' in the Hay-Varilla Treaty of 1903 was under discussion. The Commission said: 'The Treaty of 1903 was drafted and executed in English only. Its words must be interpreted according to ordinary English usage.' But this would not be a conclusive test even in private international law.

terms are not introduced unnecessarily; they should as far as possible be drafted in plain, non-technical language.

Secondly, the exclusion of State contracts from the class of international agreements which may be governed by public international law appears to rest upon the incapacity of persons other than States to conclude agreements so governed. Thus the Concession Agreement between Iran and the Anglo-Iranian Oil Company was held by the International Court to be nothing more than 'a concessionary contract between a government and a foreign corporation'.¹ The settlement of disputes clause in that Agreement had provided for the application of the law laid down in Article 38 of the Statute of the Court. It is surprising that the intention of the parties, so expressly declared, to 'internationalize' the contract² should be defeated; while the Agreement between the Sheikh of Abu Dhabi and the Petroleum Development Company, though no system of law was expressly invoked to govern it, was held to 'invite, indeed prescribe, the application of principles rooted in good sense and common practice of the generality of civilised nations—a sort of modern law of nature'.³ There seems to be no reason why State contracts should not rank as international agreements to the extent that they can, according to their terms, be held to be subject to international jurisdiction, even though they cannot be governed by the positive rules of public international law.

V. *Conclusions*

The preceding observations suggest the following conclusions:

- (1) the contractual character of international agreements depends upon the intention of the parties to create legal relations between them;
- (2) international agreements are to be presumed not to create legal relations unless the parties expressly or impliedly so declare;
- (3) there are two decisive tests of intention to create legal relations: first, whether the parties have declared, or it is to be deduced from the agreement as a whole, that it is to be governed by one of three bodies of law to which the parties are capable of referring the agreement; second, whether the parties have provided for the settlement of disputes arising from the agreement by compulsory judicial process;
- (4) international agreements of political obligation are not enforceable by judicial process but the maintenance of international order entails that they are binding on the parties.

¹ *I.C.J. Reports*, 1952, p. 112.

² The term is devised by Mann, loc. cit.

³ *Per* Lord Asquith of Bishopstone in the *Abu Dhabi Arbitral Award*, reported in *International and Comparative Law Quarterly*, 1952, p. 251.

THE CONFLICT OF LAW-MAKING TREATIES

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I

THE world community still has no legislature and it seems improbable that anything comparable to a national legislature can be developed on a world scale in the foreseeable future. Supra-national legislative authorities may be created successfully within limited political communities at no distant date,¹ but on the most optimistic estimate of their possibilities these are more likely to represent new forms of decentralized federalism adapted to the needs of areas—such as western Europe, the original home of the national State—where traditions of national independence are particularly strong, than to afford a model for new international institutions on a world scale. The constant creation of new law by legislative action has, however, become as characteristic a feature of the world community as of the modern State.² Statutory law has always been regarded by common lawyers as of secondary interest³ and this attitude has frequently coloured the evaluation of the importance of law-making treaties in the development of international law. An attitude of caution on the subject is, of course, both legitimate and wise for, as Sir Arnold McNair has pointed out, ‘the term “international legislation” is a metaphor’, since ‘the essence of “legislation” is that it binds all persons subject to the jurisdiction of the body legislating, whether they assent to it or not, whether their duly-appointed representatives assent to it or not’, whereas international legislation ‘only binds parties who have duly signed the law-making treaty and, where necessary, as it usually is, have ratified it’.⁴ But the content of even widely-ratified law-making treaties is frequently treated by the international lawyer with a degree of detachment which recalls Lord Wright’s statement that the bulk of ‘the statutory portion of law . . . is now great and is growing, but such law is for the specialist and has little interest for the student of law save in so far as it illustrates principles of construction and save in so far as it indicates trends of social thought and policy, which may have repercussions on the attitude of judges when they deal with common law questions of kindred character’.⁵ This is an understandable reaction to a complex body of detailed rules, many of them dealing with matters of a highly technical character, which do not afford the same scope as the common law for the

¹ Concerning the suggested legislative powers of the proposed European Political Community see Robertson in this *Year Book*, 29 (1952), pp. 383–401.

² See Hudson, *International Legislation*, vol. i (1931), Introduction.

³ See, for example, Wright, *Legal Essays and Addresses* (1939), pp. 396–8

⁴ See McNair, ‘International Legislation’, in *Iowa Law Review*, 19 (1934), No. 2, p. 178.

⁵ Op. cit., p. 397.

development of legal principle by argument from precedent. A similar reaction on the part of the international lawyer who finds himself called upon to assimilate the complex economic, social and technological subject-matter of current international co-operation in order to grasp the purpose and effect of a law-making treaty dealing with currency, atomic energy, high-frequency broadcasting, load-lines, air-worthiness of aircraft, international social security standards and the maintenance of migrants' pension rights, or the right to organize for trade union purposes and collective bargaining, is equally understandable. The relationship between international law and the natural and social sciences is attracting increasing interest, but the new territory brought within the field of legal regulation in recent years still tends to be regarded as peripheral by orthodox legal opinion. In the municipal field the impact of the newer developments has been more decisive, and the importance of contemporary statute law for the understanding and evaluation of the legal system as a whole and the determination of new questions as they arise is now rapidly securing full recognition.¹ A comparable recognition of the part played by the law-making treaty in transforming the scope and content of international law is the necessary starting-point for fuller examination of the problems which call for urgent consideration in order that further progress may be made in the development of an effective international legislative process.

1. *Conflict as an unavoidable incident of the present stage of development of the international legislative process*

The international legislative process has many imperfections,² some of which can be eliminated by forethought and prudence, whereas others, being inherent in the nature of the process, give rise to problems for which appropriate solutions must be found on the assumption that the imperfection itself cannot be wholly eliminated.³ In this article an attempt will be made to focus attention upon an imperfection of this latter type which has come into increased prominence in recent years.

¹ See Maine, *Early History of Institutions*, Lecture XIII, p. 398; Allen, *Law in the Making* (2nd ed., 1930), pp. 248-303; Friedmann, *Law and Social Change in Contemporary Britain* (1951), pp. 237-65; Denning, *The Changing Law* (1953); Pound, 'Common Law and Legislation', in *Harvard Law Review*, 21 (1908), pp. 383-407; Freund, *Legislative Regulation* (1932); Stone, *The Province and Function of Law* (1946), pp. 626-46; Frankfurter, 'Some Reflections on the Reading of Statutes', in *Association of the Bar of the City of New York* (1947), No. 6.

² See, for instance, Brierly, 'The Shortcomings of International Law', in this *Year Book*, 5 (1924), pp. 4-16; Fischer Williams, *International Change and International Peace* (1932); Torsten Gihl, *International Legislation* (1937); Kunz, 'The Problem of Revision in International Law', in *American Journal of International Law*, 33 (1939), pp. 33-55; Charles de Visscher, *Théories et réalités en droit international public* (1953), pp. 172-81.

³ See Jenks, 'Les Instruments internationaux à caractère collectif', in Hague Academy of International Law, *Recueil des Cours*, 69 (1939), pp. 451-543; 'The Need for an International Legislative Drafting Bureau', in *American Journal of International Law*, 39 (1945), pp. 163-79; and 'The Impact of International Organisations on Public and Private International Law', in *Transactions of the Grotius Society*, 37 (1951), pp. 31-37.

In the absence of a world legislature with a general mandate, law-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law. These instruments inevitably react upon each other and their co-existence accordingly gives rise to problems which can be conveniently described, on the analogy of the conflict of laws, as the conflict of law-making treaties. This situation is in part a reflection of the present structure of international organization. A wide range of organizations with general, functional or regional responsibilities now frame legislative instruments for ratification or acceptance in some other form by States. The danger of frustration and confusion, resulting either in failure to ratify instruments which are mutually incompatible or in failure to apply such instruments when ratified, is implicit in such a situation. Conflicts of law-making treaties, in so far as they result from the co-existence of different international legislative procedures, are indeed as inseparable from the co-existence of such procedures as conflicts of laws have proved to be inseparable from the co-existence of different systems of municipal law, and some of the problems which they involve may present a closer analogy with the problem of the conflict of laws than with the problem of conflicting obligations within the same legal system. There are, however, valid historical, political and functional reasons for this complex structure of international organization and it must be accepted as one of the elements in the problem,¹ in the same manner in which federalism, whatever its disadvantages, must be regarded as the essence of the political structure of the United States, Canada, and Australia.

It is, moreover, only one element in a still more complex problem which also arises in a number of other forms, in the case of which the analogy of conflicting obligations within the same legal system is more apposite than that of the conflict of laws. One of the most serious sources of conflict between law-making treaties is the imperfect development of the law governing the revision of multipartite instruments and defining the legal effect of such revision. Whenever, for instance, a revised international instrument, certain of the provisions of which are incompatible with those of the original instrument, comes into force for some but not all of the parties to the original instrument, and the original and revised instruments remain in force simultaneously for the parties to both of them in respect of their relations with different groups of co-contractants, a conflict arises.²

¹ See Jenks, 'Co-ordination in International Organization: An Introductory Survey', in this *Year Book*, 28 (1951), pp. 29-89.

² See Tobin, *The Termination of Multipartite Treaties* (1933); Charles de Visscher, *op. cit.*, pp. 382-8; Jenks, 'The Revision of International Labour Conventions', in this *Year Book*, 14 (1933), pp. 42-64; the same, 'The Contribution of the International Labour Organisation to the

The problem must therefore be stated in broader terms. The possibility of a conflict arises whenever instruments which are in force for different groups of parties deal with related questions or have repercussions upon one another in any other way, irrespective of whether such instruments are concluded within the framework of the same or of different international or regional organizations or are concluded directly by the parties without the participation of any international organization. The problems presented by conflicts between bilateral treaties concluded between identical parties are relatively simple and resolve themselves into the determination of the intention of the parties; it is not proposed here to consider them further. Conflicts between bilateral treaties the parties to which are not identical involve more complex problems, but these can still be resolved by the application of established principles derived from the law of contract. The real difficulties arise when we come to consider conflicts between multipartite instruments which, although concluded between identical groups of parties, operate in different functional orbits and sometimes within the framework of different international organizations, conflicts between a multipartite instrument and another instrument (multipartite or bilateral) to which some but not all of the parties to the first instrument are parties (*inter se* instruments), and conflicts between multipartite instruments the parties to which consist of groups which contain some, and in some cases a large majority of, common members but which do not coincide (a typical situation in connexion with the revision of multipartite instruments). As we analyse cases of these types much of the accepted thinking on the subject becomes increasingly unreal. The essence of the problem is that, despite aviation, telecommunications, atomic energy, and mutual interdependence for welfare and security, the world is still too large and various to permit of a unified legislative process or of vesting in international bodies mandatory legislative powers which are not strictly limited by subject-matter;¹ and that in this situation the optional or adoptive character of international legislation necessarily results in the degree of application of the existing body of international legislation differing for each member of the world community. The political, legal, economic, and social factors which influence the acceptance and rate of acceptance of instruments on particular subjects by different States vary widely. The process of development is, however, constant and, though uneven in the extreme, is on the whole a rapid one.² We cannot, without arresting this process of development, take

Development of Procedures of Peaceful Change', in *New Commonwealth Quarterly*, 4 (1939), pp. 361-79, and 'The Montreux Conference and the Law of Peaceful Change', *ibid.* 2 (1936), pp. 242-51.

¹ Cf. Zimmern, *The Prospects of Democracy* (1929), pp. 313-69; Charles de Visscher, *op. cit.*, pp. 172-82.

² See, for instance, Garner, *Recent Developments in International Law* (1925); Hudson, *Inter-*

refuge in any such simple principle as that prior obligations always take precedence of later ones. In these circumstances, the conflict of law-making treaties, while obviously an anomaly which every possible precaution should be taken to avoid, must be accepted as being in certain circumstances an inevitable incident of growth, and it becomes an essential part of the duty of international lawyers, while encouraging the adoption of procedures which will minimize the occurrence of such conflict, also to formulate principles for resolving such conflict when it arises.

2. *Early discussions of the conflict of treaties*

While the importance which has recently been assumed by the problem of the conflict of law-making treaties is a reflection of the progress made, particularly since 1919, in the development of an international legislative process and of the intensive international legislative activity of recent years, the problem of the conflict of treaties arose at a much earlier date and is discussed in some detail by Grotius,¹ Pufendorf,² and Vattel.³ The rules on the subject formulated by Vattel have frequently been re-echoed by later writers, including Phillimore⁴ and Hall,⁵ and may still sometimes be suggestive in particular cases, but they are of limited application to the contemporary problem. Vital as it is to approach the problems of the present and the future with a respectful understanding of the history and traditions out of which they have grown and must continue to grow, we cannot by delving back into the classics and history of international law relieve ourselves of the responsibility of thinking through afresh principles and rules which meet the new needs arising from the contemporary development of the world community. In respect of the conflict of law-making treaties, this task is both an important and by no means an impossible one. When Story published his *Conflict of Laws* in 1834, and to a large extent when Westlake published the first edition of his *Private International Law* in 1858, the conflict of laws was hardly recognized as a separate branch of jurisprudence. It is now generally acknowledged that Westlake's treatise had a decisive influence on the development of English law on the subject.⁶ It may be hoped that the conflict of law-making treaties will never assume the same measure of practical importance or present problems of the same intricacy, but the analogy is none the less a suggestive indication of the nature of the

national Legislation, vol. i (1931), Introduction; Jessup, *A Modern Law of Nations* (1948); Dickinson, *Law and Peace* (1951); Corbett, *Law and Society in the Relations of States* (1951).

¹ *De Jure Belli et Pacis*, Book II, cap. xvi, para. 29.

² *De Jure Naturae et Gentium*, Book V, cap. xii, para. 23.

³ Book II, cap. xvii, paras. 311-22; translation by Fenwick in *Classics of International Law* edition, vol. iii (1916), pp. 218-21.

⁴ *International Law*, vol. ii (3rd ed., 1882), pp. 126-32.

⁵ *International Law* (8th ed. by Pearce Higgins, 1924), pp. 395-7.

⁶ See Dicey, 'His Book and His Character', in *Memories of John Westlake*, ed. by Fischer Williams (1914).

task which now confronts international lawyers. We have at our disposal, much as Westlake had in 1858, scraps of diplomatic precedent, judicial decision, and textbook authority, some of which are helpful, and a number of valuable articles, some of them by leading authorities, are now available on particular aspects of the subject,¹ but the formulation of a coherent body of consistent principles on the subject as a whole has as yet hardly been begun. In evolving such a body of principles on the basis of the general principles of law recognized by civilized nations, international law cannot continue to draw exclusively on the law of contract, which has little bearing on some of the problems which arise in practice; it will also be necessary for it to place under contribution, as far as they are relevant or suggestive of analogies, national practice in regard to conflicts between statutes, the principles applied in reconciling general and subordinate legislation, federal and State legislation under federal systems, and imperial and colonial legislation under the Colonial Laws Validity Act,² and any applicable principles of the conflict of laws. In this article only a preliminary exploration of the subject can be attempted.

We will begin by endeavouring to indicate the practical extent of the problem and the extent to which the present state of the law has already been clarified, and will then attempt to analyse more fully the nature of the problem and to indicate some of the steps which can be taken to minimize the occurrence of conflicts, and will conclude by attempting—without undertaking to explore in detail the possible contributions of these varied sources to the new body of law which is required—to outline tentatively some of the principles which may to varying extents be invoked to resolve such conflicts as may arise.

In attempting to state such principles we shall, of course, be confronted with the question, analogous to that which has bulked so large in the discussion of rules of treaty interpretation,³ of the extent to which rules of

¹ See Quincy Wright, 'Conflicts between International Law and Treaties', in *American Journal of International Law*, 11 (1917), pp. 566-79; Lauterpacht, 'The Covenant as the Higher Law', in this *Year Book*, 17 (1936), pp. 54-65, and 'Contracts to Break a Contract', in *Law Quarterly Review*, 52 (1936), pp. 494-529; Fischer Williams, 'The New Doctrine of Recognition', in *Transactions of the Grotius Society*, 18 (1932), pp. 109-29; Verzijl, 'La Validité et la nullité des actes juridiques internationaux', in *Revue de droit international*, 15 (1935), pp. 320 ff.; Kunz, 'The Meaning and the Range of the Norm *Pacta Sunt Servanda*', in *A.J.* 39 (1945), pp. 180-97; Kelsen, 'Conflicts between Obligations under the Charter of the United Nations and Obligations under other International Agreements', in *University of Pittsburgh Law Review*, 10 (1949), pp. 284-9; Aufricht, 'Supersession of Treaties in International Law', in *Cornell Law Quarterly*, 37 (1952), pp. 655-700.

² Cf. Allen, *Law in the Making* (2nd ed., 1930), pp. 304-71; Wheare, *Federal Government* (1946), pp. 55-78 and 222-51; Keith, *Responsible Government in the Dominions* (2nd ed., 1928), pp. 339-49.

³ See, for instance, *Annuaire de l'Institut de droit international*, 43 (1950), Part 1, pp. 367-460; Hyde, *International Law, Chiefly as Applied and Interpreted by the United States*, vol. ii (2nd ed., 1945), pp. 1468-72; Lauterpacht in this *Year Book*, 26 (1949), pp. 49-55; Fitzmaurice, *ibid.* 28 (1951), pp. 2-25.

conflict are of substantial practical value in resolving issues which it will frequently be necessary to determine by 'the exercise of common sense . . . applied in good faith and with intelligence'.¹ Assuming, as it is submitted we must, that the development of a coherent body of principles on the subject is not merely desirable but necessary, we shall be constrained to recognize that, useful and indeed essential as such principles may be to guide us to reasonable conclusions in particular cases, they have no absolute validity. In the *Casablanca* case a strong Permanent Court of Arbitration tribunal² pointed out that a conflict of jurisdiction between an occupying nation claiming authority in respect of members of the occupation force and a consular authority exercising extraterritorial rights 'can not be decided by an absolute rule which would in a general manner accord the preference to either of the two concurrent jurisdictions' but that 'in each particular case account must be taken of the actual circumstances which tend to determine the preference'.³ The same principle would appear to be applicable in respect of the conflict of law-making treaties. No particular principle or rule can be regarded as of absolute validity. There are a number of principles and rules which must be weighed and reconciled in the light of the circumstances of the particular case.

3. *Diplomatic practice*

Conflicts between successive treaties, particularly between bilateral treaties and between treaties concluded between groups of parties of varying composition, have frequently been the subject of diplomatic correspondence and controversy, and there have been a number of *causes célèbres* familiar to all students of diplomatic history. These include the compatibility with the Treaty of Vienna of 1815 of the Treaty of 6 November 1846 between Austria, Russia and Prussia providing for the annexation of Cracow;⁴ the compatibility of the Treaty of San Stefano with the Treaty of Paris of 1856 (the issue on the basis of which the British Government insisted on the holding of the Congress of Berlin of 1878);⁵ the compatibility with the treaty guaranteeing the neutrality of Luxembourg of 1867 of a proposal for the accession of Luxembourg to the German Confederation;⁶ the compatibility of a proposed general treaty of arbitration between Great Britain and the United States with the Anglo-Japanese Alliance;⁷ the compatibility with the Clayton-Bulwer Treaty of 1850, and the Hay-Pauncefote Treaty of 1901 between the United Kingdom and the United States of

¹ Fitzmaurice, loc. cit., p. 3.

² Judges Hammarskjöld, Fry, Renault, Fusinato, and Kriege.

³ See Scott, *Hague Court Reports* (1916), p. 114.

⁴ See McNair, *The Law of Treaties* (1938), p. 117.

⁵ Ibid., pp. 117-18.

⁶ Ibid., p. 123.

⁷ Ibid., p. 118.

successive conventions negotiated and concluded by the United States with Colombia and Panama;¹ the compatibility of the Treaty of Rapallo of 1922 between Germany and Russia with the Versailles peace settlement and subsequent engagements towards the ex-Allied Powers;² the compatibility of the Franco-Soviet Alliance of 1935 with the Treaty of Locarno of 1925 (the issue invoked by Germany as a justification for abrogating the Locarno Treaty);³ and the compatibility of the North Atlantic Treaty with the Charter of the United Nations⁴ (a recurrent subject of diplomatic controversy in recent years). No useful purpose would be served by attempting here a survey of these cases and of the other available records of diplomatic practice. In the nature of the case such a survey cannot, without assuming the proportions of a monograph, be comprehensive in character or even represent a fair general appraisal of the positions taken at different times by different States. These positions have frequently been based on the precise terms of particular treaties and the exact intentions, known or presumed, of the parties. The above recapitulation of *causes célèbres* is a sufficient illustration of the fact that these positions have been largely influenced by political considerations and have therefore varied with circumstances. Accordingly, while some of these positions, particularly in so far as they are known to have been based on authoritative legal advice,⁵ may be of considerable interest and importance in connexion with particular cases or problems of conflict, they are only one of a number of elements which must be taken into account in assessing the contemporary problem. The diplomatic practice does, however, show clearly, on even the most superficial examination, that the problem of conflicts of treaties is neither new nor negligible, that it may involve major political issues as well as legal technicalities, and that it is closely related to the fundamental problem of international law, namely, that of reconciling the claims of legal order, stability and respect for duly-created rights and obligations with the pressure of growth, development and change which constitutes the law of life itself.

4. *The practical extent of the problem*

The political and historical importance of some of these *causes célèbres* does not, however, give any true measure of the practical extent of the problem in its contemporary form or of its intrinsic complexity; this can best be illustrated by a number of examples of the types of case which are

¹ See McNair, *op. cit.*, pp. 119-21.

² *Ibid.*, p. 124.

³ See *Documents on International Affairs*, 1936, pp. 1-120; Reitzer, 'Le Traité franco-soviétique est-il compatible avec le pacte de Locarno?', in *Revue de droit international et de législation comparée*, 1937, pp. 545 ff.

⁴ See Beckett, *The North Atlantic Treaty, the Brussels Treaty and the Charter of the United Nations* (1950); *Documents on International Affairs*, 1949-1950, pp. 179-82 and 268-73; *ibid.*, 1951, pp. 321-41.

⁵ See particularly McNair, *op. cit.*

liable to arise at the present time, selected chiefly though not exclusively from current international legislation on economic and social questions.

The Charter of the United Nations, like the Covenant of the League of Nations, provides for economic measures in restraint of threats to the peace, breaches of the peace and acts of aggression which may involve complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication;¹ such measures therefore involve suspension of the normal operation of the general international conventions on these subjects. Provision for this and any other contingencies in which a conflict may arise is made in Article 103 of the Charter, which provides that in the event of any conflict between the obligations of Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail.²

Apart from instruments with the special constitutional character or status of the Covenant of the League of Nations or the Charter of the United Nations, there are in existence or under consideration a number of other instruments of a general or comprehensive character which deal in a general manner with questions regulated in greater detail by other instruments or groups of instruments. Instruments dealing in general terms with human rights, such as the proposed United Nations Covenant on Human Rights, fall into this category. The proposed Covenant on Civil and Political Rights, for instance, contains articles relating to forced or compulsory labour³ and to the right to form and join trade unions;⁴ these articles reproduce with variations certain provisions of the relevant international labour conventions which deal with these matters in greater detail. The proposed Covenant on Social and Economic Rights deals in general terms with matters such as equal pay,⁵ conditions of work,⁶ trade union rights,⁷ social security,⁸ and maternity protection,⁹ which are regulated in much greater detail by the relevant international labour conventions. The difficulty of avoiding inconsistency and conflict between statements of general principle which cannot, by their very nature, contain the qualifications and exceptions necessary to make them workable in practice and the detailed instruments

¹ Article 41 of the Charter.

² Concerning this provision of the Charter see Goodrich and Hambro, *The Charter of the United Nations* (2nd ed., 1949), pp. 517-19; Kelsen, *The Law of the United Nations* (1950), pp. 111-21; Ross, *The Constitution of the United Nations* (1950), pp. 33-35. As to the corresponding provision of the Covenant (Article 20) see Schücking and Wehberg, *Die Satzung des Völkerbundes* (2nd ed., 1924), pp. 667-9; Ray, *Commentaire du Pacte de la Société des Nations* (1930), pp. 569-70; Lauterpacht, 'The Covenant as the "Higher Law"', in this *Year Book*, 17 (1936), pp. 54-65.

³ Article 8 of the 1953 draft.

⁵ Articles 3 and 7 of the 1953 draft.

⁷ Article 8.

⁹ Article 10.

⁴ Article 21.

⁶ Article 7.

⁸ Article 9.

on the subject which embody such reservations and exceptions is considerable. Instruments for the codification of international law, in so far as they go beyond formulating the customary law and attempt to deal in general terms with questions regulated in greater detail by law-making treaties of a technical character, will also tend to fall in the same category. The International Law Commission, while at one stage contemplating an attempt to state the general principles underlying the international collision regulations, has recognized the danger of conflict which would be involved if it were to trench on the more technical fields.¹

Conflicts between international instruments designed to be of world-wide application (but not necessarily sufficiently widely ratified to be effectively so) and regional instruments are not uncommon. A classical illustration is afforded by the conflict between the Convention for the Regulation of Aerial Navigation of 1919 and the Havana Commercial Aviation Convention of 1928, the inconsistencies between which made simultaneous compliance with both of them virtually impossible;² at least one State (Panama) was a party to both Conventions, and other States signed both without ratifying either; such a situation, inconvenient even in the 1930's, became untenable with the development of inter-continental air services and both Conventions were superseded by the Chicago International Civil Aviation Convention of 1944.³ There were similar inconsistencies between the Washington Convention on the Regulation of Automotive Traffic of 1930⁴ and the Paris Convention on Motor Traffic of 1926⁵ which, though ratified chiefly by European States, was nominally international and was ratified by certain Latin-American, Middle Eastern and Asian States; the United Nations Convention on Road Traffic of 19 September 1949 is designed to eliminate these inconsistencies by superseding both the Paris and the Washington Conventions, while allowing regional agreements within its framework in respect of certain matters of detail.⁶ A further illustration is afforded by the Berne and Inter-American Conventions for the Protection of Literary and Artistic Works, between which there are important inconsistencies; successive attempts to unify the two systems of protection having failed,⁷ a Universal Copyright Convention was concluded in 1952 to supplement the existing systems of protection—without either impairing

¹ United Nations, *Reports of the International Law Commission on the Work of its Second, Third, and Fifth Sessions*.

² Warner, 'The International Convention for Air Navigation and the Pan-American Convention for Air Navigation: A Comparative and Critical Analysis', in *Air Law Review*, 1932, p. 225.

³ *United Nations Treaty Series*, vol. 15, p. 295.

⁴ See Hudson, *International Legislation*, vol. v, pp. 786-92.

⁵ *Ibid.*, vol. iii, pp. 1859-72.

⁶ United Nations Conference on Road and Motor Transport, 1949, *Final Act and Related Documents*.

⁷ See Ladas, *The International Protection of Literary and Artistic Property*, vol. i (1938), pp. 635-73.

them or reconciling the conflict between the two Conventions—by defining a minimum standard of copyright protection applicable to relationships not otherwise protected.¹ During the inter-war period it was chiefly in the Americas that there was a marked tendency to duplicate international instruments by regional instruments which tended to reproduce the provisions of the corresponding international instruments with major or minor variations; in more recent years inter-American Conferences have tended to express most of their conclusions in declarations, recommendations or resolutions rather than in conventions, which frequently failed to secure the necessary ratifications, and it is chiefly in Europe that, as a result of the movement for a larger measure of European unity, there is a tendency for the number of regional instruments of a binding character to grow rapidly. The Council of Europe has sponsored a European Convention for the Protection of Human Rights and Fundamental Freedoms;² Interim Agreements and Conventions on Social Security³ and a Convention on Social and Medical Assistance;⁴ a Convention on the Equivalence of Diplomas leading to Admission to Universities;⁵ and a Convention relating to the Formalities required for Patent Applications.⁶ A European Code of Social Security, a European Cultural Convention, and a European Convention on the Reciprocal Treatment of Nationals are in course of preparation, and the desirability of a European Act for the Peaceful Settlement of International Disputes and a European Convention on Extradition is being studied.⁷ Preliminary studies have been undertaken with a view to a European Agreement on certain aspects of civil procedure.⁸ The Economic Commission for Europe has sponsored European Agreements concerning the Application of Certain Provisions of the 1949 Road Traffic Convention; Customs Conventions on Touring, on Commercial Road Vehicles, and on the International Transport of Goods by Road;⁹ Conventions to Facilitate the Crossing of Frontiers for Passengers and Baggage Carried by Rail and for Goods Carried by Rail;¹⁰ and a General Agreement on Economic Regulations for International Road Transport.¹¹ All of these instruments deal with matters which are or may be governed in varying degrees by international instruments, and in each case there is a possibility

¹ U.N.E.S.C.O., *Copyright Bulletin*, vol. v, Nos. 3 and 4, pp. 30-41.

² Council of Europe, *European Treaty Series*, No. 5.

³ *Ibid.*, Nos. 12 and 13.

⁴ *Ibid.*, No. 14.

⁵ *Ibid.*, No. 15.

⁶ *Ibid.*, No. 16.

⁷ Council of Europe, Consultative Assembly, Fifth Ordinary Session, *Documents*, vol. ii (1953), pp. 279-98.

⁸ Institut International pour l'Unification du Droit Privé, *Études XXIX*.

⁹ Economic Commission for Europe, Inland Transport Committee, *Agreement providing for the Provisional Application of the Draft International Customs Convention on Touring, on Commercial Road Vehicles and on the International Transport of Goods by Road*.

¹⁰ Texts issued by the Economic Commission for Europe as unnumbered documents.

¹¹ United Nations Document E/ECE/186/E/ECE/TRANS./460 of 22 March 1954.

of conflict between the corresponding provisions of the international and the regional instrument.

There is, of course, a legitimate function for regional instruments which supplement general international instruments. There are cases in which a larger measure of agreement can be secured through regional co-operation than would be possible on a broader international basis. Regional instruments may deal with problems which are peculiar to or take a particular form in a particular region; they may deal with problems which it is premature or of little practical importance to deal with on a world-wide scale; they may prescribe a higher standard, more extensive facilities, a greater degree of unification of previous law or practice, or a fuller measure of reciprocity than can be secured internationally; they may provide for greater uniformity in a particular region than is practicable on a wider basis in the application of provisions in a general instrument leaving certain matters to national discretion; they may provide for concerted action in a particular region representing a first step towards the implementation of an international instrument which sets a standard, or provides for obligations, which it is still not practicable to apply in that region without substantial modifications. In these and similar respects, regional agreements may give the international legislative structure the flexibility which is necessary to make it realistic. The problem is essentially one of balancing these advantages against the danger of conflict involved in the coexistence of international and regional agreements on the same subject and the possibility that regional agreements may tend to perpetuate, instead of representing a stage in the elimination of, discrepancies and disparities between different parts of the world in regard to matters in respect of which a common international rule or standard is desirable. In some cases the relevant international instrument contains a provision designed to govern the relationship between it and any regional instruments which may be concluded. The Charter of the United Nations contains such a provision concerning regional security arrangements.¹ The Universal Postal Convention permits the establishment of restricted unions provided that conditions less favourable to the public than those laid down by the Convention and Regulations of the Universal Postal Union to which they are parties are not introduced.² The International Telecommunication Convention reserves the right to conclude regional agreements and form regional organizations for the purpose of settling telecommunications questions susceptible of being treated on a regional basis, provided such agreements are not in conflict with the Convention.³ In other cases the relationship between international

¹ Article 52.

² Universal Postal Convention, 1952, Article 9.

³ International Telecommunications Convention, 1952, Article 42.

and regional agreements has been developed on empirical lines. In the field of road transport, for instance, the United Nations Convention on Road Traffic of 1949 supersedes the earlier Paris and Washington Conventions and affords a basis for international uniformity in respect of the rules of the road, signs and signals, driving permits and such matters, but is supplemented by European Agreements in accordance with its provisions; the Agreement for the Provisional Application of the Draft International Customs Conventions on Touring, Commercial Road Vehicles and the International Transport of Goods by Road provides for the provisional application of these Conventions on a regional basis pending the coming into force of world-wide conventions, and the General Agreement on Economic Regulations for International Road Transport, while dealing with certain matters, including conditions of employment in international road transport operations, which are also governed by international instruments,¹ is purely European in character. The case of road transport illustrates three types of relationship between international and regional instruments in respect of three parts of the problem which are at different stages of development.

The problem of the relationship between international and regional instruments is complicated by the existence of sub-regions within regions and of overlapping regions. The same subject may be dealt with in instruments applicable to a broad region, such as the Council of Europe or the Organization of American States, and in instruments applicable to particular groups of States within that region, such as the membership of the Brussels Treaty Organization or of the European Coal and Steel Community, the Scandinavian States, or the Central American States, the States of the Bolivarian region or the River Plate States. This is not unnatural, as initial action within a sub-region may be a necessary or useful step towards effective action on a wider basis. There are, for instance, European Interim Agreements on Social Security² and a Convention on Social and Medical Assistance,³ concluded under the auspices of the Council of Europe; there are also earlier conventions on these subjects concluded by the members of the Brussels Treaty Organization⁴ and by the Scandinavian States,⁵ and a further convention, designed primarily to deal with migrant miners and steel workers but bound by reason of the nature of the subject to be of somewhat wider scope, is being sponsored by the European Coal and Steel Community.⁶ In addition to a series of inter-American conventions on

¹ See the Hours of Work and Rest Periods (Road Transport) Convention, 1939: *The International Labour Code*, 1951, vol. i, pp. 232-49.

² Council of Europe, *European Treaty Series*, Nos. 12 and 13.

³ *Ibid.*, No. 14.

⁴ For the Brussels text see *The International Labour Code*, 1951, vol. ii, pp. 1033-48.

⁵ For the texts see International Labour Office, *Legislative Series*, 1949, International: 6.

⁶ Communauté Européenne du Charbon et de l'Acier, *Deuxième Rapport Général*, pp. 178-81.

extradition,¹ including the Bustamante Code, there are Central American,² Bolivarian,³ and River Plate Conventions;⁴ the relationships between the Inter-American Conventions on asylum (which are separate from the extradition conventions) and the Bolivarian Extradition Agreement, and the River Plate Convention on International Penal Law were, as we shall see, discussed by the International Court of Justice in the *Asylum* case.⁵ An analogous situation would exist if a subject were dealt with in instruments applicable to overlapping regions such as the membership of the North Atlantic Treaty Organization on the one hand and the membership of the Council of Europe or the Organization of American States on the other. Article 2 of the North Atlantic Treaty provides that the parties will contribute towards the further development of peaceful and friendly international relations by strengthening their free institutions, by bringing about a better understanding of the principles upon which these institutions are founded, and by promoting conditions of stability and well-being, and it has sometimes been suggested that the action to be undertaken for this purpose should include the conclusion of conventions similar to the Council of Europe and Inter-American Conventions: the result of such action might well be the development of four parallel systems of instruments (international, North Atlantic, inter-American, and West European) dealing with the same subjects, binding for a number of the same parties, and not necessarily consistent with each other.

Multipartite instruments of general application and instruments creating a special international régime for a particular area may also include provisions dealing with the same subject-matter. Thus, certain of the Trusteeship Agreements governing the administration of trust territories, in addition to containing a general provision that the administering authority shall apply the provisions of appropriate international conventions and recommendations, also lay down broad principles on such questions as slavery, forced labour, and the traffic in arms, liquor and drugs,⁶ a number of which are regulated in greater detail by other international agreements applicable to the trust territories. An analogous problem may arise in respect of other areas subject to a special international régime.

Instruments on economic and social questions framed with regard to the special political status of non-metropolitan territories or the stage of economic and social development reached by certain under-developed territories may deal with subjects also dealt with more fully in instruments

¹ See Scott, *The International Conferences of American States, 1889-1928*, pp. 83-88; *American Journal of International Law*, 29 (1935), Suppl., pp. 278-82 and 285-93.

² *Ibid.*, pp. 293-6.

⁴ *Ibid.*, pp. 275-8.

³ *Ibid.*, pp. 282-5.

⁵ See *infra*, p. 424.

⁶ See, for example, Trusteeship Agreement for Western Samoa, Article 6; Trusteeship Agreement for Somaliland, Article 3 (3).

of a general character which may at some stage become applicable to the territories covered by the special instruments. There are examples of this kind of situation in the case of international labour conventions. Thus, the Labour Inspectorates (Non-Metropolitan Territories) Convention, 1947,¹ reproduces, in some cases in a simplified form, certain of the provisions of the Labour Inspection Convention, 1947,² adopted at the same session of the Conference, and some of the points dealt with in the Right of Association (Non-Metropolitan Territories) Convention, 1947,³ are dealt with more fully in the Freedom of Association and Protection of the Right to Organise Convention, 1948, and the Right to Organise and Collective Bargaining Convention, 1949.⁴ Unless the greatest care is taken such special instruments may create or perpetuate discrepancies with the requirements of the general instruments.

Instruments for the protection of particular categories or groups of people may tend to cut across the provisions of instruments dealing with particular subjects or problems. Thus, the United Nations Convention relating to the Status of Refugees of 28 July 1951 includes provisions concerning wage-earning employment⁵ and labour legislation and social security⁶ which deal with points also dealt with in certain international labour conventions, notably the Migration for Employment Convention (Revised), 1949,⁷ and a number of the social security conventions.⁸ International instruments dealing with the status of women, such as the instruments dealing with the political, civil, and economic and social status of women which have been envisaged by the Status of Women Commission of the Economic and Social Council may tend to, and are indeed in part intended to, cut across the provisions of more general instruments dealing with questions of nationality and civil law and of instruments embodying protective standards of social legislation. Great care is equally necessary in such cases to ensure that the different instruments supplement each other and do not create conflict or confusion.

There are other cases in which conflict may occur between liberalizing instruments and regulative instruments. For instance, one instrument may provide for the relaxation of restrictions on the movement of persons or goods in the interest of greater freedom of intercourse or trade, while another may require certain specific restrictions designed to safeguard public health, morals or security or economic stability. The first class of instrument is illustrated by agreements for the simplification of customs formalities, for the elimination of import and export prohibitions and

¹ *The International Labour Code*, 1951, vol. i, pp. 1090-4.

² *Ibid.*, pp. 718-54.

³ *Ibid.*, pp. 1084-9.

⁴ *Ibid.*, pp. 677-715.

⁵ Article 17.

⁶ Article 24.

⁷ *The International Labour Code*, 1951, vol. i, pp. 1110-16.

⁸ *Ibid.*, pp. 573-9, 608-11, and 623-41.

restrictions, or for promoting the free-flow of persons and goods; the second class by agreements regulating international trade in arms or drugs, prescribing sanitary or veterinary precautions, or restricting the circulation of obscene publications.

Instruments which become applicable during a state of war may contain provisions dealing with subjects also regulated by peace-time instruments which remain applicable, in whole or in part, in time of war. Thus the Geneva Conventions relative to the Treatment of Prisoners of War and the Protection of Civilian Persons in Time of War¹ contain provisions relating to employment, working conditions, hours of work and rest periods, occupational accidents and diseases, medical supervision, and working pay, and these matters are also dealt with in international labour conventions which remain applicable in varying degrees in the event of war.

Seen in the perspective of this wide range of different types and cases of potential conflict, the problem of conflicts between instruments dealing with related subjects which fall under the functional jurisdiction of different international organizations, while by no means negligible, ceases to be a disconcerting anomaly unprecedented in its irrational and avoidable character and becomes one of a number of related weaknesses inherent in the present stage of development of international legislative technique.

It is in the field of communications that the most urgent problems of this kind have arisen and, although there have been some serious problems and the possibility of future conflict has not been eliminated, they have in large measure been solved by the gradual development of practice, by agreement between the organizations concerned, or by the somewhat empirical device—which may have much to commend it from a common-sense point of view—of leaving particular instruments to be governed by the instrument by which they were first regulated. Radiocommunication to secure safety of life at sea, for instance, is governed partly by the International Telecommunication Convention and the Radio Regulations annexed thereto and partly by the Safety of Life at Sea Convention; conflict between these instruments is avoided by the inclusion in the Safety of Life at Sea Convention of appropriate references to the Telecommunication Convention and Radio Regulations.² Aeronautical telecommunications are governed partly by the International Telecommunication Convention and the Radio Regulations annexed thereto and partly by the Aeronautical Telecommunications Annex to the International Civil Aviation Convention³ which

¹ International Committee of the Red Cross, *The Geneva Conventions of August 12, 1949*, 2nd revised ed., pp. 95–101, 168–9, 173–4, and 189–90.

² Safety of Life at Sea Convention, 1948, Chapter IV, Regulations 2, 10, 11, 12, 13, 14, and 16; Cmd. 7492 of 1948.

³ International Civil Aviation Organization, *International Standards and Recommended Practices, Aeronautical Telecommunications Annex 10 to the Convention on International Civil Aviation*.

embodies various provisions of and references to the Telecommunication Convention and Radio Regulations. Aeronautical meteorology falls within the scope of both the International Civil Aviation Convention and the Technical Regulations of the World Meteorological Organization; in this case conflict has been avoided by the issue of Specifications for Meteorological Services for Air Navigation agreed between the International Civil Aviation Organization and the World Meteorological Organization and promulgated by both of them. Meteorological telecommunications are governed partly by the International Telecommunication Convention and Regulations and partly by the World Meteorological Organization Technical Regulations which are still in draft. International air mail is at present governed by an Annex to the Universal Postal Convention, but as international regulations governing air transport are developed these may also contain provisions relating to the carriage of air mail. The sanitary control of aircraft is governed primarily by the International Sanitary Regulations,¹ for the administration of which the World Health Organization is responsible, but partly also by the Facilitation Annex to the International Civil Aviation Convention which recommends the contracting States to comply with the provisions of the International Sanitary Regulations, to accept international certificates of vaccination and re-vaccination in the form approved by the World Health Organization, and to apply certain detailed aviation facilitation procedures prescribed in the Annex, notably in connexion with disinsecting, the provision of facilities for vaccination and re-vaccination, and health and quarantine examination facilities.²

In the social field this particular aspect of the problem of potential conflict has been less acute as the International Labour Organization is the only specialized agency in the field engaged in legislative action on a large scale. No conflict has arisen hitherto between international labour conventions and recommendations on industrial health and social security medical services and World Health Organization Regulations, although there are matters in respect of which such conflict would be liable to arise if it were not avoided by agreement between the two Organizations. A potential conflict between the Migration for Employment Convention and Recommendation (Revised), 1949, of the International Labour Organization and other possible I.L.O. instruments and a proposed U.N.E.S.C.O. convention on the free flow of persons was eliminated by negotiation between the two Organizations. The question of rights of performers as regards broadcasting, television, and the mechanical production of sounds, which has become of great practical importance for the artistic world as the result of broad-

¹ World Health Organization, *Technical Report Series*, No. 41, *International Sanitary Regulations*.

² International Civil Aviation Organization, *International Standards and Recommended Practices, Facilitation Annex 9 to the Convention on International Civil Aviation*.

casting, television, and recording, involves complex legal issues involving copyright, performers' rights, and industrial and commercial interests; an attempt is being made to avoid any conflict between international instruments dealing with different aspects of the matter by the preparation of a comprehensive instrument by co-operation between the International Union for the Protection of Literary and Artistic Works and the International Labour Office. Analogous problems arise in connexion with current discussions of the possibility of granting international recognition to the rights of the authors of scientific discoveries or inventions¹ and in regard to the rights of salaried employees in respect of inventions in the course of employment; it may be necessary to deal with these in some similar manner. In some cases problems may arise in regard to the relationship between new instruments which approach a problem from a special angle and certain of the classical instruments of international law, an illustration being afforded by the relationship between the Convention for the Protection of Cultural Property in the Event of Armed Conflict, sponsored by U.N.E.S.C.O., and the Hague Conventions.

The possibility of conflict is not limited to instruments of different types, instruments of different geographical scope, instruments approaching a problem from different angles, and instruments dealing with different subjects or aspects of a subject which are related to each other; one of the most important types of conflict to be considered consists of conflicts between an original and a revised instrument, or between successive revisions of an instrument which is of the same potential scope but is in fact in force for different groups of parties.² Various devices have been adopted to avoid such conflict. The Universal Postal Convention avoids conflict by providing that,³ as from the coming into force of the Acts of a Universal Postal Congress, all the Acts of the preceding Congress are abrogated. This is a workable solution only in cases in which the practical need for States to accept the revised Acts without delay is so great that the abrogation of earlier Acts involves no danger that an existing network of international obligations may be destroyed without being replaced by equally widely accepted and effective new obligations. A variant of this formula, which was included in the instruments adopted at the Hague Conference of 1930 for the Codification of International Law,⁴ provides that the revising instrument may provide for the abrogation of the original instrument in respect of all the parties thereto. In some cases conflict is

¹ U.N.E.S.C.O., *Copyright Bulletin*, vol. vi (1952), No. 2.

² On the whole subject see Tobin, *The Termination of Multipartite Treaties* (1933), pp. 205-65.

³ Universal Postal Convention, 1952, Article 23 (3).

⁴ For the texts adopted at this Conference see Hudson, *International Legislation*, vol. v, pp. 359-94: for the formula used see, for example, Convention covering Certain Questions relating to the Conflict of Nationality Laws, Article 27, at p. 371.

avoided or minimized by construing the obligations resulting from successive Conventions as complexes of bilateral obligations which apply to the relations of different groups of parties; this has been the solution adopted in the International Union for the Protection of Industrial Property¹ and the International Union for the Protection of Literary and Artistic Works,² but it is applicable only to obligations which do not lose their effectiveness if construed in this way. The standard article on the subject included in international labour conventions since 1929 is designed to facilitate the gradual substitution of revised for original Conventions by release of Members ratifying the revising Convention from their obligations under the original Convention in a manner which avoids any conflict of obligations without destroying obligations which are not satisfactorily replaced; in the form given to this article since 1933 the International Labour Conference enjoys at the time of the revision discretion to determine in the light of the nature of the revision the precise relationship between the original and the revising instrument.³ None of these devices is, however, fully applicable to all of the cases which may arise, and some of them presuppose the inclusion of a provision on the subject in the original instrument, a condition by no means always fulfilled.

Successive instruments on the same subject may also be adopted at different historical stages in the international consideration of a question, even within the framework of the same organization, without any formal revision of the earlier instrument. The experience of the International Labour Organization again affords examples. A number of Conventions on the reduction of hours of work were adopted during the 1930's without revision of the basic Conventions on the regulation of hours of work adopted during the preceding decade.⁴ The scope of these new Conventions and the exceptions and methods of calculating hours for which they provide are not identical with those of the earlier Conventions. The Social Security (Minimum Standards) Convention, 1952, covers in a comprehensive manner branches of social security which are also regulated by earlier Conventions laying down more detailed rules in respect of particular branches of insurance.⁵

It is not, of course, suggested that in all of the types of case which have been mentioned conflicts at present exist or will inevitably exist. In many instances conflict has been avoided or minimized by prudence in the drafting

¹ See Ladas, *The International Protection of Industrial Property* (1930), pp. 125-34.

² See Ladas, *The International Protection of Literary and Artistic Works*, vol. i (1938), pp. 133-49.

³ See Jenks, 'The Revision of International Labour Conventions', in this *Year Book*, 14 (1933), pp. 42-64, and 'The Contribution of the International Labour Organization to the Development of Peaceful Change', in *New Commonwealth Quarterly*, 4 (1939), pp. 361-79.

⁴ See *The International Labour Code*, 1951, vol. i, pp. xc-xci and 189-275.

⁵ *Ibid.*, pp. 495-674.

ing of instruments or eliminated by general agreement when a divergence between different instruments has become apparent, and it may continue to be avoided, minimized or eliminated in the same manner in the future. The illustrations of such action given in the course of the preceding survey of possible types of conflict are merely illustrations which fall far short of giving a complete picture of the degree of co-ordination which has been secured in practice. But in all these types of case there is an acute and ever-present danger of conflict calling for close and continuing attention. The wide range of types of case in which the problem arises illustrates both its magnitude and its complexity. What is at stake is nothing less than the possibility of developing into a coherent body of international law the multiplicity of law-making treaties on every aspect of modern life which constitute the international statute book.

5. *The existing case law*

The existing case law concerning conflicting treaty obligations is fragmentary and throws relatively little light on the problems which have come into prominence in recent years in connexion with law-making treaties. There are a number of international and national decisions and awards concerning the conflict of treaties and relations of different treaties with each other, and the interpretation of treaties by reference to the provisions of other treaties. The majority of these have no direct bearing on the question of the conflict of law-making treaties,¹ but the problem of conflict cannot be seen in true perspective except as an element in the complex and, at times, highly technical problem of the interrelations of different treaties—a problem which has not yet received a degree of systematic treatment from international lawyers commensurate with its far-reaching importance for the legislative development of international law. A broader survey of the leading international and national decisions and awards on the interrelations of different treaties is therefore a desirable preliminary to a closer examination of the problem of conflict as such, for, as our examination of the subject proceeds, we shall find that the problem of conflict cannot be adequately solved by any simple solution such as that of invariably regarding the prior obligation as overriding, and some of the complexities disclosed by the case law dealing with other aspects of the interrelations of treaties will be found to be relevant to any attempt to formulate a balanced approach to the problem. Such a survey cannot, however, be compressed within the limits of the present article, in which it will only be possible to deal with the more important international cases.

¹ A substantial proportion of the cases having some bearing on the subject relate to the intricacies of the 1919 Peace Settlement and subsequent reparations settlements and throw little light on more general problems.

(a) *Central American Court of Justice*. The best-known international decisions relating directly to the conflict of treaties are no doubt those of the Central American Court of Justice in *Costa Rica v. Nicaragua* (1916), and *Salvador v. Nicaragua* (1917). In *Costa Rica v. Nicaragua*¹ the Court held that Nicaragua, by a Treaty concluded with the United States, had violated, to the injury of Costa Rica, the rights granted to the latter by earlier treaties and an arbitral award by President Cleveland, but that it could not declare the Bryan-Chamorro Treaty between the United States and Nicaragua null and void since the United States was not subject to the jurisdiction of the Court. In *Salvador v. Nicaragua*² the contention of Salvador that the provisions of the Bryan-Chamorro Treaty relating to the construction of a naval station in the Gulf of Fonseca involved a violation of the 1907 Treaty of Peace and Amity among the Central American States was subsidiary to the contention that it violated Salvador's rights of co-ownership in the Gulf of Fonseca, but the Court upheld both contentions and held that Nicaragua was under the obligation, availing itself of all possible means provided by international law, to re-establish and maintain the legal status that existed prior to the treaty. These cases are, however, both of marginal relevance and unsatisfactory in other respects. Though the Treaties in question were, particularly in the *Costa Rica* case, dispositive of real rights, they present few analogies with the typical law-making treaties of the present day with which we are primarily concerned;³ much of both the argument and the decision in the *Costa Rica* case turned on the extent to which two successive Treaties, of which the first was not ratified, could be regarded as a single transaction for the purpose of a requirement of diplomatic negotiation prior to recourse to the Court and on the question whether the Bryan-Chamorro Treaty involved a sale of waterway rights inconsistent with the earlier Treaties or an option which would not necessarily be inconsistent with them and could not be so regarded until the conditions under which it was to be exercised had been further defined by a later agreement. In the *Salvador* case there was also considerable argument concerning the extent to which the existence of a third party interest affected the jurisdiction of the Court and the obligation to seek first a diplomatic settlement, and the special relationship of the Central American States as elements of an inchoate Central American federation was an important factor in the decision; Nicaragua declined to accept either decision and the cases precipitated the dissolution of the Central American Court of Justice.⁴

¹ For an English translation of the decision see *American Journal of International Law*, 11 (1917), pp. 181-229; for the official Spanish text see *La Gaceta*, Costa Rica, 7 October 1916.

² For an English translation of the decision see *American Journal of International Law*, 11 (1917), pp. 674-730.

³ On the McNair classification [see 'The Functions and Differing Legal Character of Treaties', in this *Year Book*, 11 (1930), pp. 101-5] they are more of the character of conveyances.

⁴ For the story in outline see Politis, *La Justice internationale* (1924), pp. 139-55.

(b) *Permanent Court of Arbitration*. There is no Permanent Court of Arbitration case which bears directly on the question. In the *Muscat Dhows* case¹ the bearing on each other of a Treaty between France and Muscat, a Declaration between Great Britain and France, and the General Act of Brussels of 2 July 1890 for the Suppression of the African Slave Trade was relevant; there was no direct conflict, but the general flavour of the award is that the Brussels Act superseded earlier arrangements inconsistent with it.²

(c) *Permanent Court of International Justice*. The Permanent Court of International Justice came somewhat closer to grips with the problem of conflict in a variety of contexts. In connexion with its own jurisdiction, it held in the *Electricity Company of Sofia and Bulgaria* case (Preliminary Objection)³ that, where it has concurrent jurisdiction under a number of instruments, limitations upon its jurisdiction under one instrument did not operate to limit its jurisdiction under another. In the *Mavrommatis Palestine Concessions* case,⁴ in which a similar point arose, the Court, while considering that Protocol XII to the Treaty of Lausanne might, being a special and more recent agreement, prevail over the Mandate for Palestine in the event of any conflict between their provisions, held that there was not, in fact, any such conflict and that the silence of the Protocol concerning the jurisdiction of the Court did not limit the jurisdiction of the Court under the Mandate. In the *Interpretation of the Convention of 1919 Concerning the Employment of Women During the Night* case⁵ it held that the interpretation of international labour conventions is not governed by any presumption resulting from the terms of the Constitution of the International Labour Organization that they are limited in their application to manual workers. In the *Railway Traffic between Lithuania and Poland* case⁶ it held that Article 23 of the Covenant did not create specific obligations for Members of the League in the absence of the 'international conventions existing or hereafter to be agreed upon' to which it referred. It gave two important decisions concerning *pacta de contrahendo*, both of them relating to international rivers: in the *Territorial Jurisdiction of the International Commission of the*

¹ See Scott, *Hague Court Reports* (1916), pp. 93-100.

² In the *Japanese House Tax* case the Tribunal interpreted bilateral Treaties on the same subject concluded by France, Germany, and Great Britain respectively with Japan as a whole (Scott, *Hague Court Reports* (1916), pp. 77-85). The *Island of Timor* case (*ibid.*, pp. 354-400) involved a succession of bilateral Treaties between the same parties relating to the same subject, but no question of conflict was involved. Pearce Higgins, in *Hall's International Law* (8th ed., 1924), p. 395, mentions the *North Atlantic Coast Fisheries* case (Scott, *op. cit.*, pp. 141-225) in connexion with the principle, which Hall himself had applied in earlier editions to treaties granting fishing rights but prohibiting landing for drying or curing, that, when a conflict occurs between different provisions of a treaty or between different treaties, a generally or specifically imperative provision takes precedence of a general permission; the point did not, however, arise in the *North Atlantic Coast Fisheries* case, in which no conflict of treaties was involved.

³ *P.C.I.J.*, Series A/B, No. 77.

⁵ *Ibid.*, Series A/B, No. 50.

⁴ *Ibid.*, Series A, No. 2, pp. 29-33.

⁶ *Ibid.*, No. 42.

River Oder case¹ it held that a *pactum de contrahendo* does not impose the obligations of a general convention concluded thereunder upon States which do not become parties to it; and in the *Jurisdiction of the European Commission of the Danube between Galatz and Braila* case² it held that a duly ratified treaty cannot be alleged to be void on the ground that its terms exceed the mandate conferred on the Conference which prepared it by a previous *pactum de contrahendo*. In the *Danube* case, Judge Nyholm, in observations additional to the Opinion of the Court, and Judge Negulesco, in a Dissenting Opinion, construed the relationship of the Danube Statute to the Treaty of Versailles as being that of a regulation to a law.³ In the *Oscar Chinn* case,⁴ Judges Van Eysinga and Schücking, dissenting, expressed the view that the Convention of St. Germain relating to the Congo Basin was void between its signatories on the ground that it modified the General Act of Berlin of 1885 without the assent of all the signatories thereto; this point had not been raised by either of the parties and the Court did not consider it necessary to deal with it; Judges Van Eysinga and Schücking considered it to be of such importance that they felt the Court must deal with it *ex officio*. In the *Wimbledon* case,⁵ Judge Schücking, dissenting, relied in support of his interpretation of the provisions of the Treaty of Versailles concerning the Kiel Canal on a contrast between its provisions and those of the Treaties governing the Suez and Panama Canals and the illegitimacy of interpreting the Treaty of Versailles in a manner inconsistent with the Hague Convention No. V of 1907. Other Permanent Court decisions are of more marginal relevance. In the *Interpretation of the Treaty of Neuilly* case⁶ the Court took account of a divergence between the provisions of the Treaty of Neuilly and the corresponding provisions of the Treaty of Versailles for the purpose of interpreting the Treaty of Neuilly. In the case concerning the *Factory at Chorzów* (Claim for Indemnity—Jurisdiction) it discussed the extent to which it should, for the purpose of determining its jurisdiction under the Geneva Convention concerning Upper Silesia of 1922, take into account expressions used in other arbitration clauses and treaties.⁷ The *Austro-German Customs Régime* case⁸ involved the compatibility of the proposed customs régime with prior multilateral treaty commitments of Austria, while the *Free Zones of Upper Savoy and the District of Gex* case⁹ involved the effect of the Treaty of Versailles on the 1815 Peace Settlement.

(d) *International Court of Justice*. The International Court of Justice has dealt on a number of occasions with the interrelations and effect on each

¹ *P.C.I.J.*, Series B, No. 14.

³ *Ibid.*, pp. 73 and 129.

⁵ *Ibid.*, Series A, No. 1, pp. 43-47.

⁷ *Ibid.*, Series A, No. 9, pp. 20-25.

⁹ *Ibid.*, Series A/B, No. 46.

² *Ibid.*

⁴ *Ibid.*, Series A/B, No. 63, at pp. 131-50.

⁶ *Ibid.*, Series A, No. 3.

⁸ *Ibid.*, Series A/B, No. 41.

other of different treaty engagements but as yet the decisions which it has had occasion to give on such points have thrown no further light on the question of conflict of treaties. In the *International Status of South-West Africa* case¹ the Court considered the relationship between Article 22 of the Covenant of the League of Nations and Chapter XII of the Charter of the United Nations; the case is an important authority on the succession of one international organization to another in respect of rights and responsibilities under treaty instruments. The question at issue was essentially how far South Africa was under an obligation to discharge continuing obligations under the Covenant and the Mandate through the machinery provided for in the Charter, and no question arose of a conflict between the Covenant and the Charter. In the *Asylum* case² the relationship of successive inter-American instruments relating to asylum from 1889 to 1939, and more particularly the extent to which the 1933 Montevideo Convention was to be regarded as amending or interpreting the 1928 Havana Convention, was discussed, but no question of conflict arose directly. In the *Minquiers and Ecrehos* case³ a series of medieval treaties was discussed somewhat indecisively. In the *Ambatielos* case⁴ the preliminary judgment of the Court upholding its jurisdiction to determine whether the parties were under an obligation to arbitrate deals with the relationship to a 1926 Treaty of an accompanying Declaration which the Court held to be in the nature of an interpretation clause which should be regarded as an integral part of the Treaty; with the relationship between the 1926 Treaty and an 1886 Treaty, certain procedural provisions of which were maintained in operation in respect of events governed by them by the 1926 Declaration; and with a contention (which the Court rejected) that the procedural provisions of the 1926 Treaty could be applied retroactively to events governed by the 1886 Treaty as the applicable substantive clauses of the two Treaties were similar. The later Judgment of the Court on the merits of the obligation of the parties to arbitrate⁵ deals further with the relationship between the 1926 Declaration and the 1886 Treaty and with a contention that the most-favoured-nation clause of the 1886 Treaty makes other treaties applicable. In the *Anglo-Iranian Oil Company* case (Preliminary Objection)⁶ the Court held that a most-favoured-nation clause contained in a Treaty earlier in date than the ratification of the Declaration giving jurisdiction to the Court could not be relied upon to found a claim to invoke subsequent treaties for the purpose of establishing the jurisdiction of the Court. The Judgment of the Court in the case concerning *Rights of Nationals of the United States of America in Morocco*⁷ deals with the com-

¹ *I.C.J. Reports*, 1950, pp. 128-9.

² *Ibid.*, 1953, pp. 47-109.

³ *Ibid.*, 1953, pp. 10-35.

⁷ *Ibid.*, 1952, pp. 176-237.

² *Ibid.*, pp. 266-389.

⁴ *Ibid.*, 1952, pp. 28-88.

⁶ *Ibid.*, 1952, pp. 93-171.

bined effect of bilateral treaties, most-favoured-nation clauses, the Madrid Convention of 1880 and the Act of Algeciras of 1906, but does not involve any question of conflict.

There are also a number of decisions of marginal interest and relevance by miscellaneous international tribunals.¹

A number of national cases from various countries deal with the relations of different treaties with each other but do not bear directly on the question of conflict.²

The position may be summarized as being that the case law on the subject is fragmentary and, while including a number of decisions which may be suggestive in connexion with various aspects of it, has not had any decisive influence. The law on the conflict of law-making treaties has not yet been crystallized by judicial or arbitral decision.

Before proceeding further in the matter it is necessary to examine more closely the nature of the conflicts with which we are concerned.

6. *The distinction between divergence and conflict*

A divergence between treaty provisions dealing with the same subject or related subjects does not in itself constitute a conflict. Two law-making

¹ See, for instance, *Eastern Bank, Ltd. v. Turkish Government* (*Annual Digest of Public International Law Cases*, 1927-8, Case No. 298); *Ungarische Erdgas A.G. v. Rumanian State* (*ibid.*, 1929-30, Case No. 241); *Schumacher v. Serb-Croat-Slovene State* (*ibid.*, 1919-22, Case No. 250); *Neugass v. Austria and Hungary* (*ibid.*, 1927-8, Case No. 305); *Wilhelm et Cie v. Czechoslovak State* (*ibid.*, 1929-30, Case No. 237); *Gologan et Al. v. Germany* (*ibid.*, 1925-6, Case No. 305); *Case concerning the Execution of the German-Portuguese Arbitral Award of June 30th, 1930* (*Reports of International Arbitral Awards*, vol. iii, pp. 1373-86); *Sambiaggio Case* (Ralston, *Venezuelan Arbitrations of 1903*, pp. 690-1); *Corvaia Case* (*ibid.*, pp. 809-10); *Roney and Boles v. United Mexican States* (*Reports of International Arbitral Awards*, vol. iv, pp. 16-17); *American Bottle Co. v. United Mexican States* (*ibid.*, pp. 435-9); *Lagrange v. United Mexican States* (*ibid.*, pp. 535-7); *Pomeroy's El Paso Transfer Co. v. United Mexican States* (*ibid.*, pp. 551-64); *Sewell v. United Mexican States* (*ibid.*, pp. 626-32); *Gorham v. United Mexican States* (*ibid.*, pp. 640-646); *Najera v. United Mexican States* (*Reports of International Arbitral Award*, vol. v, pp. 466-508); *France v. Poland, In re Compagnie d'Electricité de Varsovie and the Municipality of Warsaw* (*Annual Digest*, 1929-30, Case No. 243); *Greece v. Bulgaria, In re Central Rhodopia Forests* (*ibid.*, 1933-4, Case No. 39); *France v. Belgium, In re Interpretation of the Tardieu-Jaspar Agreement of 17 January 1930* (*ibid.*, 1935-7, Case No. 223); *United States v. Sweden, In re The Kronprins Gustaf Adolf* (*ibid.*, 1931-2, Case No. 205); *Cession of Vessels and Tugs for Navigation on the Danube Case* (*Reports of International Arbitral Awards*, vol. i, pp. 97-212); *Acquisition of Polish Nationality Case* (*ibid.*, pp. 402-28, at pp. 409-10); *Case between Germany and the Reparations Commission concerning the Interpretation of Article 260 of the Treaty of Versailles* (*ibid.*, pp. 429-528).

² See, for example, *Russian Trade Delegation in Italy v. Querci (Italy)* (*Annual Digest and Reports of Public International Law Cases*, 1941-2, Case No. 129); *Tacconi v. Société des Produits Chimiques (Italy—Court of Cassation)* (*ibid.*, 1933-4, Case No. 194); *Mollet v. Lemoine (France)* (*ibid.*, 1935-7, Case No. 125); *Zumkeller v. Florence and Peillon (France)* (*ibid.*, Case No. 202); *Société Ruegger et Bontet v. Société Weber et Howard (France)* (*ibid.*, 1933-4, Case No. 179); *Vicens v. Bonfillon (France)* (*ibid.*, Case No. 180); *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox Ltd. (United States of America—Supreme Court)* (*ibid.*, Case No. 1); *Singer v. United States (United States)* (*ibid.*, 1919-42 (Supplementary Volume), Case No. 112); *Gulf of Finland Control Zones Case (Estonia)* (*ibid.*, 1935-7, Case No. 193); *Whittall v. The Administrator of German Property (United Kingdom)* (*ibid.*, 1931-2, Case No. 191).

treaties with a number of common parties may deal with the same subject from different points of view or be applicable in different circumstances, or one of the treaties may embody obligations more far-reaching than, but not inconsistent with, those of the other. A conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties.

There is no conflict in this strict sense of direct incompatibility although a party may have different obligations to co-contractants under different instruments, if its obligations can be analysed into a complex of bilateral obligations which can be separated from each other and independently performed in relation to each of the other parties; in such cases the only conflict which can arise relates to its obligations to a particular party and can be resolved relatively easily on the basis of presumptions concerning the intentions of the two parties. The position is different where the obligations resulting from an instrument are of an objective character and cannot be analysed as separable obligations towards individual parties; in such cases, if the obligations of the different instruments cannot be performed simultaneously, there is a conflict between obligations each of which has an objective validity but which are owed towards different groups of parties. In such circumstances, presumptions concerning the intentions of these different groups of parties, while relevant and possibly in some cases important, may tend to neutralize each other and will rarely be conclusive. Convenient as it may be to seek to evade the responsibility for attempting to formulate principles of general application by insisting that the question must always resolve itself into one of intention, the difficulty remains that a choice must frequently be made between the conflicting intentions of different international organs or groups of parties the intentions of which were for the most part limited to the facts with which they were directly concerned and did not embrace the other elements in the problem. It is in these conditions that the problem of the conflict of law-making treaties becomes most acute and must be determined on the basis of law rather than intention.

7. Other divergences which defeat the object of a treaty

A divergence which does not constitute a conflict may nevertheless defeat the object of one or both of the divergent instruments. Such a divergence may, for instance, prevent a party to both of the divergent instruments from taking advantage of certain provisions of one of them recourse to which would involve a violation of, or failure to comply with, certain requirements of the other. A divergence of this kind may in some cases, from a practical point of view, be as serious as a conflict; it may, for instance, render inapplicable provisions designed to give one of the diver-

gent instruments a measure of flexibility of operation which was thought necessary to its practicability. Thus, while a conflict in the strict sense of direct incompatibility is not necessarily involved when one instrument eliminates exceptions provided for in another instrument or, conversely, relaxes the requirements of another instrument, the practical effect of the coexistence of the two instruments may be that one of them loses much or most of its practical importance. In other cases the coexistence of divergent instruments may result in substituting for a comprehensive network of international obligations covering a particular subject applicable to all or the majority of States a number of separate or overlapping networks of obligations covering different groups of States. Such a situation does not necessarily involve conflicts of obligations in the strict sense, but it is almost unavoidable that it should involve considerable practicable and administrative inconvenience and it may involve a serious degree of uncertainty and confusion.

For while every divergence between two or more law-making treaties relating to the same subject does not necessarily imply a conflict, every such divergence does involve a departure from uniformity. Uniformity is only one of the objectives of international legislation, and its relative importance varies considerably with the nature of the subject-matter, but it is generally an important and often the main objective. The reconciliation of divergent national views, interests and legal systems to secure international uniformity is a laborious and time-consuming process, and the substitution of divergent international instruments for divergences of national law and practice, while possibly representing in some cases a significant step towards real international uniformity, still falls far short of the objective in view.

II

Having defined to this extent the scale and nature of the problem, it remains to consider how it can be resolved.

1. *The presumption against conflict*

It seems reasonable to start from a general presumption against conflict. Such a presumption has a recognized place among the principles of statutory interpretation. Maxwell states it succinctly with directness and clarity:

‘An author must be supposed to be consistent with himself and therefore, if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed. In this respect the work of the Legislature is treated in the same manner as that of any other author and the language of every enactment must be construed as far as possible in

accordance with the terms of every other statute which it does not in express terms modify or repeal.¹

An interpretation of a statute which involves a repeal by implication of an earlier statute is not to be adopted unless it be inevitable, since 'any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention'.²

The presumption against conflict has a similar place in the law of contract. A number of simultaneous or successive contracts between different parties connected with the same series of transactions will be interpreted so far as possible consistently with each other. This is indeed merely an extension of the principle that the particular terms of a contract are to be construed in the sense which is most consistent with the general intention.³ It is therefore natural that the same presumption should have found a place among the principles of treaty interpretation which figure so largely in the older books. Grotius, apparently discussing simultaneously contradictions between different clauses of the same agreement and contradictions between different agreements, says that 'there is need of conjectures whenever in compacts there is "an appearance of contradiction"' for then 'interpolations are to be sought which will reconcile the different parts with one another, if this is possible'.⁴ Vattel considers restrictive interpretation necessary 'when-ever the law or the treaty, taken strictly according to its terms, would lead to something unlawful'.⁵ Among modern writers Oppenheim states the principle particularly clearly:

'It is taken for granted that the contracting parties intend something reasonable, something adequate to the purpose of the treaty, and something not inconsistent with generally recognised principles of International Law, nor with previous treaty obligations towards third States. If, therefore, the meaning of a stipulation is ambiguous, the reasonable meaning is to be preferred to the unreasonable, the more reasonable to the less reasonable, the adequate meaning to the meaning not adequate for the purpose of the treaty, the consistent meaning to the meaning inconsistent with generally recognised principles of International Law and with previous treaty obligations towards third States.'⁶

The presumption against an interpretation which involves a conflict between law-making treaties is simply a detailed application of such fundamental principles of treaty interpretation as the principle of reasonableness, the principle of good faith, and the presumption of consistency with international law.

¹ Maxwell, *Interpretation of Statutes* (7th ed., 1929), at p. 136.

² *Ibid.*, at p. 144. Cf. Freund, *Legislative Regulation* (1932), p. 411: 'As a legal act, a statute . . . must adjust itself to the operation of other statutes and to existing law.'

³ See Pollock, *Principles of Contract*, 10th ed., p. 252; *Anson's Law of Contract*, 17th ed. by Miles and Brierly, p. 322.

⁴ Bk. II, cap. xvi, iv (1). See also Pufendorf, *De Jure Naturae et Gentium*, Book V, cap. xii, para. 23.

⁵ Vattel, Bk. II, cap. 17, para. 293.

⁶ *International Law*, vol. i (7th ed. by Lauterpacht, 1948), pp. 858-9.

The presumption against conflict is perhaps less strong in respect of law-making treaties than in the case of national legislation. In the case of legislation, successive laws are the work of the same legislature, whose consistency of intention it is reasonable to presume in law even though historical evidence, if admitted, might introduce some doubt in the matter. In the case of law-making treaties, successive instruments are frequently the handiwork of different organizations or groups of parties the consistency of whose intentions can less readily be assumed. In the case of instruments open to general ratification, however, the potential parties are much the same and if the instruments have been widely ratified there will be a substantial number of common parties. It is therefore reasonable to presume, when the interpretation of an instrument is doubtful, that the parties intended it to be construed in a manner consistent with the obligations of some or all of them under other instruments.

The presumption against conflict is not, however, of an overriding character. It is one of the elements to be taken into account in determining the meaning of a treaty provision, but will not avail against clear language or clear evidence of intention. Such a presumption will not suffice to reconcile clearly unreconcilable provisions; there may be a question as to which of two apparently conflicting treaties should be restrictively interpreted on the basis of the presumption; and even where this difficulty of determining how to apply the presumption does not have the effect of reproducing the same problem at another stage of the analysis of the problem, the presumption may have to be weighed against other elements even in the absence of clear language or clear evidence of intention. Such problems arise in the infinitely simpler field of statutory interpretation where in the last resort the most recent statute prevails and the doctrine of implied repeal eliminates all difficulties; it is only natural that they should be more acute internationally, where variation in the parties to instruments and other factors normally make any doctrine of implied repeal by later instruments untenable. In these circumstances, the presumption against conflict may eliminate certain potential conflicts; it cannot eliminate the problem of conflict.

2. Procedural precautions to avoid conflict

The incidence of the problem can be further reduced if adequate precautions are taken in connexion with the drafting of instruments to avoid potential conflicts. One of the safeguards desirable for this purpose is full consultation between those responsible for the drafting of instruments dealing with related subjects which are negotiated under the auspices of different bodies. The Administrative Committee on Co-ordination of the

United Nations and the Specialized Agencies¹ has recommended to the participating organizations the inclusion in their rules of procedure of provisions requiring mutual consultation prior to the adoption of international conventions by inter-governmental bodies and the submission to the body by which a convention is to be adopted of any comments on the proposed draft made by another organization which may be concerned. The necessary action to embody these provisions in their rules of procedure is in process of being taken by the various bodies concerned. Without providing any means of determining authoritatively conflicts of policy between different bodies—a course which would present great difficulties—this device makes it possible to eliminate unintentional conflicts and ensures that other potential conflicts are brought into the open in a manner which facilitates dealing with them before the terms of proposed instruments have become final. The International Labour Organization has employed the device with useful results when preparing instruments dealing with matters of concern to F.A.O., U.N.E.S.C.O., and W.H.O.

It is important that the scope of such consultations should not be limited to the United Nations and the specialized agencies but should include all international and regional organizations which may be concerned in the subject-matter under consideration. From a practical point of view such consultation between the international and regional organizations is of increasing importance. In certain cases there is formal provision for it, in general terms, in agreements between international and regional organizations providing that they will keep each other mutually advised of matters of common interest,² and it is believed that it is becoming increasingly common. In order that such consultations may be fruitful it is important that there should develop in international and regional organizations and among Governments, and on the part of all who, in political, legal or technical capacities, are called upon to contribute to the formulation of law-making treaties, a habit of regarding the international statute book as a whole and attempting to judge of the value, proper scope, and detailed content of any proposed instrument not in isolation but in relation to the complex of law-making treaties on a wide range of intricately interrelated subjects of which it will form a part.

This is partly a question of approach and partly a question of technical legal equipment. The necessary breadth of approach implies an understanding, both in international and regional organizations and in Governments, of the interrelationships of different types and sectors of action and

¹ As to which see Jenks, 'Co-ordination in International Organization: An Introductory Survey', in this *Year Book*, 28 (1951), pp. 75-76 and 84-85, and 'Co-ordination: A New Problem of International Organization', in *Hague Recueil*, 77 (1950), pp. 189-293.

² See, for example, Agreement between the I.L.O. and the Organisation of American States, Article 4; Agreement between the I.L.O. and the Council of Europe, Article 7.

the interplay of international, regional and national forces, which can only gradually be achieved through sustained effort by such bodies as the Economic and Social Council and the Administrative Committee on Co-ordination.

The technical legal equipment necessary to give a picture of the international statute book as a whole is still defective in the extreme. The impact on international law of the legislative action of the last ninety years, and particularly of the period since 1919, has still not been adequately assessed in any standard treatise, and perhaps the task has now become so complex that it could only be undertaken in the form of a series of monographs following some common plan. Invaluable as is much of the literature on special subjects, it does not fill the need for an international equivalent of Halsbury's *Laws of England* describing comprehensively in the context of the previous law the content of the whole body of law-making treaties now in force for any considerable number of parties. Even the texts currently in force are not conveniently available.¹ Matters of this kind are too easily dismissed as of secondary importance, but they have a direct practical bearing on the quality of the craftsmanship which can be brought to the improvement of the international statute book.

Assuming a broad, positive, and imaginative approach to the whole problem and the availability of more adequate technical legal equipment, innumerable devices which have already been evolved by experience in particular contexts could be more systematically employed and further such devices developed as new problems arise or new solutions for existing problems become apparent, with a view to dovetailing instruments dealing with related subjects into a coherent body of law. A number of illustrations of such devices have been given in appraising the present extent of the problem; no attempt can be made here to survey exhaustively the scope for further developments and it must suffice to indicate a few general preoccupations which are worthy of special attention in developing such devices.

¹ Comprehensive treaty collections such as de Martens, the *League of Nations Treaty Series* and the *United Nations Treaty Series* contain a large proportion of them, but there is frequently substantial delay in publication. The 110 volumes of de Martens for the period prior to the League Series, followed by the 205 volumes of the League Series and the 97 volumes of the United Nations for the period 1946 to August 1951, all of which contain innumerable bilateral instruments of temporary interest, are not a serviceable tool for practical use in the drafting of instruments in such a manner as to interlock with each other to the maximum possible extent, however invaluable they may be as a general work of reference. Hudson's *International Legislation*, in nine volumes, is an invaluable collection for the period 1919-45, but no similar collection is available for the earlier and later periods. Information concerning the present status of many instruments is inaccessible or unreliable, and the United Nations publication *Status of Multilateral Conventions of which the Secretary-General Acts as Depositary* would be very much more valuable if it could be made more comprehensive in character and include all instruments registered with the Secretariat under the Charter, whether or not the United Nations acts as depositary, together with instruments which were registered with the League of Nations and any others for which the necessary information is available from depositary Governments.

A precaution which may frequently be useful and which will sometimes be the natural result of consultations with bodies responsible for other instruments, is that of including in a new law-making treaty a clause reserving or maintaining the provisions of an earlier instrument a conflict with which might otherwise arise. As illustrations of such clauses may be mentioned the articles contained in such instruments as the North Atlantic Treaty,¹ the Rio Treaty,² and the Anzus Treaty,³ providing that they are not intended to impair or prejudice in any way the provisions of the Charter of the United Nations. While these provisions may, except in so far as non-Members of the United Nations may be concerned, be legally superfluous in view of Article 103 of the Charter, their importance as an affirmation of the intention of the parties to conform fully to the Charter must not be underestimated. The United Nations Draft Covenant on Civil and Political Rights contains a proviso that the restrictions which it sanctions of the right of association in general do not 'authorise States parties to the International Labour Convention of 1948 on Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention'.⁴ The possible usefulness of the device is not limited to cases of this character which involve large political or social issues. It may be equally useful in highly technical regulations when it is desired to make it clear that an instrument dealing with some subject as a whole or from some new angle is not intended to deal with some particular aspect of the subject which has already been dealt with in another connexion by an earlier instrument.

Whenever it is necessary for an instrument to deal for some new purpose with matters already covered to some extent by an existing instrument, it may be desirable to reproduce or to incorporate by reference the provisions of the existing instrument rather than to legislate *de novo* in the matter; even though the existing instrument may be defective in certain respects, its defects may be less serious than conflict or lack of uniformity in the matter. Whenever it is probable that there will be both international and regional instruments on the same subject, or that numerous bilateral agreements may be concluded on a subject dealt with in such instruments, there may be great advantage in including in the international instrument provisions defining the extent to which and manner in which regional instruments and bilateral agreements may operate within the general framework of the international instrument. When a regional instrument or sub-regional instrument is essentially a first step towards an instrument of

¹ Article 8: see *American Journal of International Law*, 43 (1949), Suppl., p. 160.

² Article 10: *ibid.*, p. 56.

³ Article 6: *ibid.* 46 (1952), Suppl., p. 94.

⁴ Article 21 of the 1953 draft.

wider scope, it may be reasonable that it should provide for its termination or absorption when an instrument of wider scope becomes operative.

The special problems which may be created by the entry into force of a revising instrument for some but not all of the parties to the original instrument can frequently be anticipated by the inclusion in the original instrument of a clause defining the effect on the obligations arising therefrom of any subsequent revision, or, where it is desirable to leave a margin of flexibility in view of the difficulty of foreseeing in advance the exact nature and effect of a future revision, a clause providing that the effect of such revision on obligations under the original instrument may be determined by the terms of the revising instrument; in this connexion, the varied experience of the Universal Postal Union and the International Labour Organization, adapted to quite different types of case, may be suggestive.

Where one law-making treaty incorporates by reference certain provisions of another, or applies in respect of persons or things fulfilling conditions specified in another instrument, special care is necessary to avoid the occurrence of difficulties in the event of the revision of the instrument incorporated by reference. When such references can be expressed in the form of a reference to the instrument in question or any revision thereof for the time being in force, or to the instrument in question or any other instrument which may be substituted therefor,¹ the danger that the revision of one instrument may dislocate the operation of another is greatly reduced.

Special care is necessary in framing provisions concerning the administration of instruments, reporting by Governments on their application, procedures of interpretation, and similar matters to avoid the danger of duplication or conflict. In so far as such provisions entrust related functions under different instruments to the same body, or provide for co-operation in the discharge of such functions by the different bodies concerned, they will tend to minimize this danger.

3. *Procedure for resolving conflicts*

The presumption against conflict and the precautions in connexion with the negotiation, drafting and administration of instruments which have been suggested cannot be relied upon to avoid all conflicts. When conflicts arise, it is important that appropriate arrangements should exist for resolving them. The nature of these arrangements will necessarily vary to some extent with the nature of and the parties to the instruments involved, the nature of the conflict between them, and the nature and number of the

¹ For an illustration of the first of these formulae see the reference to the Safety of Life at Sea Convention in Article 18 (2) (c) of the Wages, Hours of Work and Manning (Sea) Convention (Revised), 1949 (*The International Labour Code*, 1951, p. 813); for an illustration of the second see the reference to the International Radiotelegraph Convention in Article 32 of the Safety of Life at Sea Convention, 1929 (Hudson, *International Legislation*, vol. iv, p. 2750).

organizations responsible for initiating and administering them. Where a conflict arises between international and regional instruments concluded within the general framework of the same organization, or between agreements approaching problems from different angles which are so concluded, or between an original and a revising convention, the question is one to be resolved within the framework of the appropriate organization by its own procedures. The extent to which this will be done by authoritative decision, by negotiation, by allowing the conflict to remain unresolved while minimizing certain of its effects, or by some combination of these, will depend on the structure, powers and procedures of the organization concerned and the circumstances of the case. Where different organizations are responsible for the different instruments the procedure may be more complex and there may be less scope for authoritative decision as compared with negotiation, but the essential elements of the problem are not greatly changed. It will be clear from the foregoing analysis that a solution is not likely to be found by rough and ready methods based on ignoring its complexities.

In many cases the most appropriate and convenient method of resolving conflicts and, indeed, the only one likely to give practically satisfactory results, is that of negotiation between the parties, organizations or interests concerned. The possibilities of this approach, which has substantial achievements to its credit, should never be underestimated. Where direct negotiation is unsuccessful in securing a settlement, all of the existing machinery for securing the better co-ordination of the work of international organizations, including the Administrative Committee on Co-ordination at the administrative level and the authority of the Economic and Social Council and the General Assembly to mobilize opinion by making recommendations to the organizations concerned, is available to promote the elimination of conflict by agreement. It is only in the event of these approaches failing that it becomes necessary to envisage any procedure for resolving conflicts by authoritative decision; and there may well be cases in which it is wiser to leave a conflict temporarily unresolved while taking whatever action may be practicable to minimize certain of its effects, rather than to attempt prematurely to settle it by an authoritative decision which may secure a formal settlement at the price of perpetuating underlying elements in the conflict which have not been satisfactorily reconciled.

If an authoritative decision becomes necessary or appropriate it would seem desirable that the responsibility for such decision should normally be entrusted to a judicial body which would be guided in reaching a decision by a sense of responsibility for the long-term development of international law as a body of principles, rules and obligations based on good faith, justice, equity and the 'reason of the thing'. While the function of such

decision may perhaps be legislative in its essential character, no legislative body has been entrusted with such responsibility hitherto and it seems questionable whether it could at present be effectively discharged by an international body composed on a political basis. The determination of such conflicts already falls within the jurisdiction of the International Court of Justice in so far as they may be relevant to matters duly submitted for its decision or opinion in accordance with the provisions of the Statute. In so far as such conflicts are relevant to the determination of the rights and duties of the parties to a contested case the Court will be called upon to pass upon them in the course of deciding the case. It would also seem to be within the authority of the General Assembly¹ and possibly of the Economic and Social Council² (if the matter were to be regarded as within the scope of its co-ordinating activities) to request an advisory opinion on a question of conflict. The authority to request advisory opinions conferred by the General Assembly upon the specialized agencies by the terms of the relationship agreements excludes questions concerning their mutual relationships with the United Nations or other specialized agencies, but the purpose of this limitation was presumably to prevent the relationships between the different international organizations from assuming an unnecessarily legalistic or litigious character. It would, consistently with this general purpose, seem possible for such a request to be made jointly by the agencies concerned, though the technicalities of presenting the request, which might involve securing the co-operation in the matter of the Economic and Social Council or the General Assembly, would require careful consideration. In the event of the Statute of the International Court being amended at some future time to permit international organizations to be parties to contested cases,³ it would also be possible for questions of conflict to be submitted to it for decision by agreement between the organizations concerned, though a question might arise as to how far the agreement or acquiescence of the parties to the instruments was also necessary for the submission of a case for a decision.

In any case, it would seem clear that, given the complex structure and interrelations of contemporary law-making treaties, no State can reasonably claim to abrogate unilaterally an obligation under any such treaty on the ground of an alleged inconsistency therewith of, or an alleged violation of the terms thereof by, another treaty. Any such question, if not settled by agreement between the parties or organizations concerned, must be regarded as one for judicial determination. There may be cases in which a party is entitled to claim release from its obligations under one instrument,

¹ Article 96 (1) of the Charter.

² Article 96 (2) of the Charter and General Assembly Resolution 89 (I).

³ Cf. Jenks, 'The Status of International Organizations before the International Court of Justice', in *Transactions of the Grotius Society*, 32 (1946), pp. 1-41.

either in order to enable it to fulfil obligations under another instrument which for some valid reason must be regarded as superseding its obligations under the first instrument, or on the ground that a conflict between the instrument from which it claims release and some other instrument has involved a violation by other parties of their obligations towards it under the instrument from which it claims release, which entitles it to such release.¹ Any such claims must be regarded as matters for judicial and not for unilateral determination.²

4. *Principles of conflict*

It remains to outline briefly the principles of conflict which would appear to be applicable when it becomes necessary to resolve conflicts, judicially or otherwise, by recourse to legal principle. We have already distinguished seven such principles and have emphasized that none of these can be regarded as of absolute validity but that they must be weighed and reconciled in the light of the circumstances of the particular case. These seven principles which it is now proposed to consider may be described as the hierarchic principle, the *lex prior* principle, the *lex posterior* principle, the *lex specialis* principle, the autonomous operation principle, the 'pith and substance' principle, and the legislative intention principle.

Any attempt to outline such principles must necessarily be tentative and to some extent speculative, as such principles, though arising directly from the known complexities of the problem, cannot be based on any clearly-established authority. A preliminary analysis of some of the principles which must be reconciled in order progressively to evolve satisfactory rules and precedents on the subject may, however, be a helpful starting-point for the more detailed examination of particular problems as they mature for consideration and decision.

(a) *The hierarchic principle.* The hierarchic principle represents the transposition to international life of the principle which determines the validity of legislation governed by a rigid constitution (and, to some extent, that of subordinate legislation in the United Kingdom). The historical origins of the application of the principle internationally are to be found in the conception that certain general treaty settlements such as those following the successive great wars of European history, distinguished by Oppenheim as 'treaties having the character of international settlements', were of a special character in virtue of which they must be regarded as the public law of Europe. From this conception it was but a step to the recognition that treaties such as the Covenant of the League of Nations

¹ Cf. Fischer Williams, 'Treaties and the Doctrine of *Rebus Sic Stantibus*', in *Chapters on Current International Law* (1929), pp. 86-110; McNair, *The Law of Treaties* (1938), pp. 492-515.

² Cf. Harvard Research in International Law, Draft Convention on the Law of Treaties, printed in *American Journal of International Law*, 29 (1935), Suppl., pp. 1077-96.

and the General Treaty for the Renunciation of War created 'a kind of public law transcending in kind and not merely in degree the ordinary agreements between States'.¹

Formal expression was first given to this principle in Article 20 of the Covenant of the League of Nations whereby the Members of the League severally agreed that the Covenant was accepted as abrogating all obligations or understandings *inter se* which were inconsistent with the terms thereof, solemnly undertook that they would not thereafter enter into any engagements inconsistent with the terms thereof, and accepted a duty to take immediate steps to procure release from obligations inconsistent with the terms of the Covenant undertaken before they became Members.² In 1935 the Legal Sub-committee of the Co-ordination Committee, established on the recommendation of the League Assembly to co-ordinate action under Article 16 of the Covenant in the dispute between Italy and Ethiopia, considered the effect of this Article and adopted reports concerning (1) the application of sanctions and private contracts, commercial treaties, and treaties of non-aggression; (2) the application of the most-favoured-nation clause, and (3) the application of sanctions and international sanctions concerning freedom of communications;³ these reports were subsequently annexed to proposals by the Co-ordination Committee which were acted upon by the Members of the League and are therefore not merely legal opinions but the legal basis of the precedents established by the action taken by the Members of the League as a whole. Their effect may be summarized as being: (1) that treaties for the reciprocal execution of foreign judgments must yield to the effect of Article 16 of the Covenant; (2) that an aggressor State has no right to complain if the application of sanctions prevents the execution in its favour of a commercial treaty but would itself incur international liability by refusing to carry out the treaty; (3) that treaties of friendship and non-aggression must be interpreted subject to Articles 16 and 20 of the Covenant, even if they contain no reservation regarding the provisions of the Covenant; (4) that most-favoured-nation clauses may not be invoked to claim the benefit of measures of mutual support incidental to the application of sanctions; and (5) that while the force and effect of obligations towards States not Members of the

¹ See McNair, 'The Functions and Differing Legal Character of Treaties', in this *Year Book*, 11 (1930), p. 112.

² As to Article 20 of the Covenant see Hunter Miller, *The Drafting of the Covenant*, vol. ii (1928), pp. 279-81, 370-4, and 380-4; Schücking and Wehberg, *Die Satzung des Völkerbundes* (2nd ed., 1924), pp. 667-9; Ray, *Commentaire du Pacte de la Société des Nations* (1930), pp. 569-70, and 1935 Supplement, pp. 98-101; Kelsen, *Legal Technique in International Law* (1939), pp. 148 ff.; Lauterpacht, 'The Covenant as the "Higher Law"', in this *Year Book*, 17 (1936), pp. 54-65.

³ See *League of Nations Official Journal*, Special Supplement No. 145, pp. 21-26. The texts of the reports are also conveniently available in *American Journal of International Law*, 30 (1936), Suppl., pp. 48-51. See also, for an examination of the reports, Lauterpacht, 'The Covenant as the "Higher Law"', loc. cit. *supra*, pp. 55-60.

League under conventions containing provisions for freedom of communications was not a matter for the League to appreciate, the League was entitled to hold that no individual Member could release itself from its obligations under Article 16 of the Covenant by invoking obligations assumed towards a country not belonging to the League. The cumulative effect of these conclusions was to establish the Covenant as a 'higher law' in relation to all matters bearing directly on breaches of the peace and action in restraint thereof.

The Charter of the United Nations contains an analogous provision (Article 103) that in the event of any conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail. The precise scope and effect of this provision can only be gauged as precise issues call for determination. As we have already seen, it has a special bearing on the application of measures in restraint of threats to the peace, breaches of the peace and acts of aggression taken under Chapter VII of the Charter.¹ The records of the San Francisco Conference indicate that the provision was intended to be applicable in relation to non-Members of the United Nations.² In relation to matters bearing directly on breaches of the peace and action in restraint thereof the Charter must be regarded in virtue of Article 103, like the Covenant in virtue of Article 20, as a 'higher law'.

There have been certain difficulties in relation to such matters. The question of the relationship between the provisions of the Charter and those of the Universal Postal Convention, the International Telecommunication Convention, and the World Meteorological Organization Convention arose during the negotiations for bringing the Universal Postal Union, I.T.U., and the W.M.O., respectively, into relationship with the United Nations. By the Agreement between the United Nations and the Universal Postal Union, the Union agrees to co-operate with and to give assistance to the United Nations only 'so far as is consistent with the provisions of the Universal Postal Convention', and a further undertaking by the Union that 'in accordance with Article 103 of the Charter no provision in the Universal Postal Convention or related agreements shall be construed as preventing or limiting any State in complying with its obligations to the United Nations' applies only 'as regards the Members of the United Nations'.³ The corresponding Articles of the I.T.U. and W.M.O. Agree-

¹ See *supra*, p. 409.

² *United Nations Conference on International Organization, Documents*, 1945, vol. 13, pp. 684-6. Article 103 is examined by Goodrich and Hambro, *Charter of the United Nations* (2nd ed., 1949), pp. 517-19; Ross, *Constitution of the United Nations* (1950), pp. 30-35; and in greater detail by Kelsen, *The Law of the United Nations* (1950), pp. 111-21.

³ Article 6 of the Agreement.

ments provide for such co-operation and assistance 'in accordance with the provisions of the United Nations Charter and the International Telecommunication Convention [the World Meteorological Convention] taking fully into account the particular position of the individual Members of the Union [Organisation] who are not Members of the United Nations'.¹

In respect of matters which do not involve the responsibility of the United Nations for the maintenance of international peace somewhat different considerations may apply, and Article 103 appears to have little, if any, further bearing on most of the questions which are liable to arise between the United Nations and the specialized agencies. Since the Charter itself specifically provides that the relationships between the United Nations and the other organizations are to be based on agreements, consultations and recommendations, Article 103 cannot be invoked as giving the United Nations an overriding authority which would be inconsistent with the provisions of the Charter itself, or as giving the United Nations any priority of jurisdiction in respect of debatable territory; such questions do not involve any conflict of obligations in the strict sense and the intention of the Charter clearly was that they should be settled through the processes of consultation and recommendation for which the Charter itself provides.² Nor can the United Nations, consistently with the principle of good faith set forth in the Charter as one of the principles in accordance with which the United Nations and its Members are to act,³ rely on Article 103 to modify unilaterally, by amendment of the Charter, relationships which it has freely contracted with other international organizations in pursuance of the general scheme of international co-operation provided for in the Charter.

Certain other instruments may perhaps be regarded, on account of their intrinsic character and the degree of acceptance which they have secured, as being similar in legal status to the Charter and prevailing in the same manner over instruments or obligations inconsistent with them on the ground that they constitute a superior norm. The General Treaty for the Renunciation of War of 27 August 1928 would appear to be in this category, and any treaty involving a violation of it may reasonably be regarded as invalid because of the illegality of its object.⁴ The same considerations do not apply to treaties defining the consequences of a state of war or regulating the conduct of war, once a warlike situation exists, whether in violation of the General Treaty for the Renunciation of War or otherwise.

Questions may arise as to how far a similar relationship can be regarded as existing between other instruments of a general character, such as a covenant of human rights or instruments specifically designed for the

¹ Article 6 of the I.T.U. Agreement; Article 6 of the W.M.O. Agreement.

² The point is discussed more fully in Jenks, 'Co-ordination: A New Problem of International Organization', in *Hague Recueil*, 77 (1950), pp. 185-6.

³ Article 2 (2) of the Charter.

⁴ Cf. McNair, *The Law of Treaties* (1938), p. 113.

codification of international law, and the great mass of international legislation of a more technical character. This is a matter to be approached with caution. It is premature to say that such instruments should never be regarded as of an overriding character. It may be the clear intention not only of those who have taken the initiative in sponsoring them but of the States which have ratified them that they should have such an overriding effect, and it may be essential to their effectiveness that they should operate in this manner. Such general instruments may, however, frequently be in the nature of statements of principle or objectives rather than of detailed rules; they may be framed, by reason of political considerations, in 'a style of drafting' which calls for 'a large and liberal spirit of interpretation'¹ and does not permit of the meticulous care appropriate to the more detailed instruments in conjunction with which they must operate in practice. The experience of countries in which a constitutionality test has been applied to legislation is not encouraging and suggests that it may not be wise to extend unduly in international law the operation of the principle that certain instruments, which may represent a stage in the development of the law which may shortly be superseded, are to be regarded as superior norms entitled on that account to an overriding validity and conceivably to a special permanence.

A hierarchic relationship similar to that between the Charter and other instruments may exist within other international organizations as between their constituent instruments and other instruments adopted or concluded in pursuance thereof. In some cases the constituent instrument of the organization explicitly provides for such a relationship; an illustration is afforded by the provision of the International Telecommunication Convention² that, in case of inconsistency between a provision of the Convention and a provision of the Regulations, the Convention shall prevail. In other cases, such as that of the International Labour Organization, the existence of such a relationship between the Constitution of the Organization and conventions concluded in pursuance thereof may be implied from the fact that the Constitution lays down a new procedure for the adoption and bringing into force of conventions and annexes certain obligations of a general character to each convention brought into force by this procedure. Where a relationship of this type exists, questions may arise from time to time as to the extent to which such general constitutional rules may be amplified or varied in their application to particular conventions by the terms of those conventions.³

¹ See Westlake, *International Law* (2nd ed., 1910), Part I, pp. 293-4.

² Article 12 (3) of the 1952 Convention.

³ On this question as it affects the International Labour Organization see Jenks, 'The International Labour Organisation as a Subject of Study for International Lawyers', in *Journal of Comparative Legislation and International Law*, 22 (1940), pp. 44-49.

A similar relationship may also exist between the terms of a general international instrument and subsequent independently-concluded bilateral, regional or other restricted instruments by virtue of an express provision of the general instrument. The International Conventions for the Protection of Industrial Property¹ and for the Protection of Literary and Artistic Works² provide, for instance, that *inter se* arrangements shall not be inconsistent with their provisions. Cases of this type, in which the hierarchic relationship is based on an express provision, rest upon a different principle from cases in which it exists as a matter of law by reason of the nature of the relationship which exists between the two instruments; in such cases the question is primarily one of good faith and they should perhaps be regarded as illustrations of the *lex prior* principle rather than of the hierarchic principle.

The form of international instruments and method of ratification or acceptance by participants has sometimes been regarded as having a bearing on their hierarchic relationship. At one time treaties concluded between Heads of States were regarded as involving a more solemn obligation than other types of instrument. There may still be cases in which the contrast between the solemnity and formality of one instrument and the relatively informal character of another is an important consideration to be taken into account, but the form of instrument can no longer be regarded as decisive. Frequently, it has little special significance, and the development of new international legislative procedures inspired by a desire to simplify and rationalize international legislative technique and to stress the collective element in international action—such as those of the International Labour Organization, the World Health Organization, the International Civil Aviation Organization—together with the increasing number and importance of the instruments expressed in the form of agreements concluded between States, Governments, Heads of Governments or administrations responsible for the subject-matter of the agreement, make any attempt to establish a hierarchic relationship of the basis of the form of the instrument, irrespective of its subject-matter and the circumstances of its conclusion, highly formalistic and artificial. In so far as the relative solemnity and formality of an instrument may continue to be relevant in particular cases, only the solemnity and formality of the international instrument itself and not that of the national action taken in relation to it would appear to be relevant. There may be a distinction in the municipal law of a particular country between a treaty and an executive agreement,³ but such a

¹ 1934 Convention, Article 15. See Ladas, *The International Protection of Industrial Property* (1930), pp. 135-46.

² 1928 Convention, Article 20. See Ladas, *The International Protection of Literary and Artistic Property*, vol. i (1938), pp. 150-79.

³ See Hyde, *International Law, Chiefly as Applied and Interpreted by the United States*, vol. ii 2nd ed., (1945), pp. 1405-18.

distinction has no special significance for the other parties to the instrument; the same instrument may be regarded as a treaty by one party and as an executive agreement by another according to differences in the national procedure followed for its acceptance. Such differences may be due in part to relatively permanent factors such as differences in national constitutional practice, and partly to such accidental considerations as the pre-existing state of the municipal law of the country or its immediate political problems. There are frequently wide variations in the nature of the instruments of ratification or acceptance whereby different parties undertake the obligations of the same instrument. There has been an increasing tendency to regard the form of international instruments as being 'purely a matter of convenience'¹ which has no substantive legal consequences, and in these circumstances it is normally unwise to attempt to construe any relationship of superior to inferior norms on the basis of the form of the instruments in which they appear.

(b) *The lex prior principle.* The *lex prior* principle was stated by Vattel as being that 'if there is a conflict between two treaties made with two different States, the earlier treaty prevails'. The principle is derived from the analogy of the law of contract and has an important application in international law in respect of conflicts between bilateral agreements (and other agreements with restricted participation) conferring inconsistent rights on different parties. In such cases, the principle of the illegality of a contract to break a contract, which is widely recognized in English, American, French and German law,² may well be fully applicable. The principle is succinctly stated in the American Law Institute *Restatement of the Law of Contracts*³ as being that 'a bargain, the making or performance of which involves a breach of a contract with a third person, is illegal'. Even if we deny with Kelsen the illegality of the subsequent contract and hold that both treaties are valid and the contracting State violates the one which it does not fulfil,⁴ the principle of the priority of the earlier obligation presents no difficulty in respect of bilateral agreements. The Harvard Research in International Law restated the principle in its Draft Convention on the Law of Treaties in the form:

'If a State assumes by a Treaty with another State an obligation which is in conflict with an obligation which it has assumed by an earlier treaty with a third State, the obligation assumed by the earlier treaty takes priority over the obligation assumed by the later treaty.'⁵

¹ See McNair, *The Law of Treaties*, 1938, p. 47.

² On the whole subject see Lauterpacht, 'Contracts to Break a Contract', in *Law Quarterly Review*, 52 (1936), pp. 494-529.

³ 1932 (vol. ii), p. 1081, § 576.

⁴ *The Law of the United Nations* (1950), p. 114.

⁵ See *American Journal of International Law*, 29 (1935), Suppl., p. 1024.

In commenting on this proposed rule the Research observed that 'apparently in no case in practice has the general principle of the priority of the obligations previously assumed by a State over those subsequently assumed by it with a third State ever been seriously denied and no decision of an international tribunal is known in which the contracting principle has been sustained'.¹ To this statement no exception can be taken, but it is significant that the evidence for it reviewed by the Research consists, with one exception,² of the views of writers and cases relating to bilateral treaties or to the consistency of such treaties with more general treaty obligations. On the applicability of the principle to law-making treaties there appears to be little authority and neither the legal nor the practical aspects of the matter have been widely discussed. We have already seen in examining the hierarchic principle that substantial qualifications to the principle were recognized and acted upon in 1935 during the application of sanctions under Article 16 of the Covenant. It may well be subject to other qualifications. Professor Lauterpacht, in his *Report on the Law of Treaties*³ prepared for the International Law Commission of the United Nations, starts from the principle that a treaty is void if its performance involves a breach of a treaty obligation previously undertaken by one or more of the parties, subject to the right of an innocent party to damages for resulting loss, but recognizes two important qualifications to this principle: first, that it is applicable only if the departure from the terms of the prior treaty is such as to interfere seriously with the interests of the other parties to the treaty or seriously to impair the original purpose of the treaty; and, secondly, that it does not apply to subsequent multilateral treaties, such as the Charter of the United Nations, 'partaking of a degree of generality which imparts to them the character of legislative enactments properly affecting all members of the international community or which must be deemed to have been concluded in the international interest'. These qualifications are a clear recognition of the nature of the problem but, as drafted, they are applicable to the conflicts between general and bilateral or other restricted instruments rather than to conflicts between instruments both of which partake of 'a degree of generality which imparts to them the character of legislative enactments'. It is significant that, while the *lex prior* principle is an important one in the law of contract, there is no corresponding principle in the law of statutory interpretation, where, on the contrary, the *lex posterior* principle represents the general rule. This suggests considerable caution in applying the principle to law-making treaties.

¹ Loc. cit., p. 1029.

² That of the compatibility of the Havana Commercial Aviation Convention of 1928 with the Paris Convention for the International Regulation of Aerial Navigation of 1919, as to which see *supra*, p. 410.

³ United Nations Document A/CN.4/63 of 24 March 1953, pp. 198-208.

In the case of law-making treaties it may be particularly difficult to determine the material dates for the purpose of evaluating priority of obligation. There is no special difficulty in the case of a conflict between instruments concluded and generally ratified at different periods, but it may well be the case that the networks of obligations based on the conflicting instruments have grown simultaneously. In such cases there are a number of dates to be considered: the dates of conclusion of the instruments by signature, opening for signature, adoption by an appropriate body or some other equivalent procedure; the dates of ratification by the parties concerned, as from which they incur a contingent obligation which becomes operative when the other ratifications required for entry into force have been received and any other conditions for entry into force fulfilled; the dates when the necessary ratifications have been received and other conditions fulfilled so that the date of coming into force is known, though there may still be an interval to elapse before that date; the dates of initial coming into force of the instruments; the date or dates of coming into force for the party concerned, when one or both of these are subsequent to one or both of the dates of the initial coming into force; and, in certain cases, the date or dates as from which the instruments were mutually binding as between the parties concerned. The wide variations which exist in the conditions for the entry into force of instruments, in the rate at which they enter into force, and in the order of ratification of instruments concluded at about the same time by different States where the political, parliamentary, legal, technical, economic, and administrative problems and difficulties involved may differ widely, necessarily result in a substantial number of cases in which certain of the dates which may be regarded as material are earlier for one instrument than for another, whereas in respect of other dates which may be regarded as material the position is reversed. The position may be further complicated by successive revisions of one or other of the instruments becoming effective for different parties at different dates. When matters reach this degree of intricacy the *lex prior* principle ceases to have any rational bearing on the real questions at issue.

Nor, unhappily, is it always reasonable, in view of the complexity of governmental organization in the modern State and the wide variations in the procedures whereby international obligations are now contracted, to assume, when conflicting networks of obligations have developed simultaneously or almost simultaneously, that the parties concerned knew, or must be deemed to have known, when undertaking an obligation of a specialized character, of the existence of a prior obligation of a similar character which may be inconsistent with it. In these circumstances one of the essential elements in the *lex prior* principle, the principle of good faith, ceases to be at issue. The principle may still be a reasonable

and convenient one in so far as some rule for resolving the conflict is necessary; and priority of obligation, when it can be determined, is an intelligible criterion which tends to discourage the irresponsible conclusion of new law-making instruments with insufficient regard for their effect on other instruments, but it loses the absolute quality attributed to it when it is thought of as a necessary consequence of the principle of good faith and it has to be weighed against, and reconciled with, other principles which may be relevant. In this process, as is fully recognized by Professor Lauterpacht when arguing the case for the *lex prior* principle on the basis of the contractual analogy, it is necessary to have regard to the fact that in view 'of the requirement of unanimity in the international sphere the role of postulating the invalidity of the second inconsistent treaty must be subject to suitable modifications so as to prevent a beneficent legal principle from becoming a source of absurdity and of obstruction of the peaceful processes of international change'.¹ As our horizon of the peaceful processes of international change extends to include technological and social as well as political development, the importance of this consideration continues to grow.

(c) *The lex posterior principle.* The *lex posterior* principle may be defined as being that later legislation supersedes earlier legislation. The scope for applying the *lex posterior* principle to the conflict of law-making treaties also appears to be limited.² It is clearly applicable as between original and revising instruments, subject to the revising instrument having been ratified by the party against which it has been invoked or the original instrument having contained a provision covering the point. With this qualified exception, it is normally applicable in respect of instruments concluded between different groups of parties, save in so far as contracting out by an *inter se* arrangement may be permissible in certain cases. The extent to which such contracting out is permissible in the case of instruments which neither expressly allow nor expressly restrict or forbid it remains one of the unsettled points of the law. The limited scope for applying the principle is a direct result of the absence of any overriding international legislative authority entitled to repeal earlier law-making treaties explicitly or by implication. In municipal law the application of the *lex posterior* principle is normally limited to the supersession of a legal norm by a norm of the same or a superior order of a more recent date; there are exceptional cases in which the most recent of two norms of different types supersedes the other, a convenient illustration being the relationship between treaties and statutes under the Constitution of the United States.³

¹ See Lauterpacht, 'Contracts to Break a Contract', in *Law Quarterly Review*, 52 (1936), p. 529.

² Aufricht in his important plea for fuller recognition of the *lex posterior* principle ('Supersession of Treaties in International Law', in *Cornell Law Quarterly*, 1952, pp. 655-700) fully recognizes this and limits the application of the principle by major qualifications.

³ As to which see Hyde, *op. cit.*, pp. 1463-4, § 529; Crandall, *Treaties: Their Making and*

There may be great advantages in providing for the fuller application of the principle in certain fields of legislative action by conferring the necessary powers on the appropriate international bodies or including a repealing or amending authority in instruments to which the principle should apply when they are originally drafted. The abrogation of the Acts of the Universal Postal Congress by the entry into force of the Acts of the succeeding Congress and the procedures for the amendment of the W.H.O. Regulations and the annexes to the International Civil Aviation Convention are steps in this direction. But, like the *lex prior* principle, the *lex posterior* principle is not particularly helpful when applied to conflicts between norms evolved in different functional or geographical orbits. A *lex specialis* may have a particularly strong claim to be regarded as such if it is also a *lex posterior*, but this is less because it is a *lex posterior* as such than because its subsequent conclusion may be regarded as important supplementary evidence of intention. On the other hand, the position taken by so many writers that a later obligation necessarily yields to an earlier one is also of limited application to law-making treaties for the reasons which we have indicated in discussing the *lex prior* principle.

(d) *The lex specialis principle.* The application of the *lex specialis* principle goes back to Grotius. 'Among agreements that are equal in respect to the qualities mentioned', he wrote, 'that should be given preference which is most specific and approaches most nearly to the subject in hand; for special provisions are ordinarily more effective than those that are general.'¹ Pufendorf² and Vattel³ lay down the same principle and have been followed by later writers. While the principle itself is an unimpeachable one and there are certain types of case in which its applicability will be readily recognized, the limits of its application are more difficult to determine in respect of the conflict of law-making treaties than in respect of statutes, in the case of which general and special provisions are enacted by the same legislature, or in respect of the general and special terms of contracts binding the same parties.

A clear illustration of its applicability is afforded by instruments relating to the laws of war which, in the absence of evidence of a contrary intention or other special circumstances, must clearly be regarded as *leges speciales* in relation to instruments laying down peace-time norms concerning the same subjects. Apart from relatively simple cases of this kind, the limits of the principle must be regarded as doubtful.

Enforcement (2nd ed., 1916), pp. 161-2, § 72; Willoughby, *The Constitutional Law of the United States*, vol. i (2nd ed., 1929), pp. 552-5, §§ 305 and 306.

¹ Book II, Cap. xvi, sec. xxix (1): translation by Kelsey in *Classics of International Law* edition, vol. ii (1929), p. 428.

² *De Jure Naturae et Gentium*, Bk. V, cap. xii, para. 23.

³ Bk. II, cap. xvii, para. 316.

Cases in which a particular instrument provides that, as between the parties, it shall operate as a *lex specialis* may appear to constitute another clear case. For instance, the European Convention on Human Rights and Fundamental Freedoms provides that the parties will not, except by special agreement, avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of the Convention to a means of settlement other than as provided for in the Convention.¹ This clause presumably applies both to instruments of a general character dealing with the interpretation or application of international conventions and to cases in which a dispute arising out of the European Convention would also involve questions relating to the application of other instruments covering some of the same ground as the European Convention. *Prima facie* such a provision would appear to make the instrument in which it appears a *lex specialis* as between the parties. A question may, however, arise in certain cases as to the compatibility of such a provision with the obligations of the parties under other instruments the terms of which they may not be entitled to modify by *inter se* arrangements. There may, therefore, be situations in which such a provision may be binding as between the parties in their mutual relations but would be of no avail if invoked before a body established under another instrument which might be bound under the autonomous operation principle to act under its own constituent instrument. This possibility appears to be recognized by the manner in which the relevant provision of the European Convention is drafted as an obligation of the parties rather than as a rule of objective validity.

The *lex specialis* principle is sometimes regarded as applicable to conflicts between instruments establishing a special international régime for a particular area, such as the trusteeship agreements, and general international conventions, the suggestion being that in the event of any such conflict the instrument establishing the special régime must prevail, but there is no satisfactory authority on the point. Such instruments normally include a provision for the application of general international conventions, and it would be altogether anomalous that general international conventions should be less completely applied in areas subject to a special international régime than elsewhere. The principle can, of course, also be reversed in respect of such cases, a general international convention on a subject being regarded as the *lex specialis* covering a matter dealt with in such an instrument in general terms. In these circumstances, the suggestion must be regarded as distinctly questionable, though it may be reasonable to take the *lex specialis* principle into account, together with the other principles and any available evidence of legislative intention, in deciding each case on its merits.

¹ Article 62.

(e) *The autonomous operation principle.* The autonomous operation principle, understood in the sense that each international organization must regard itself as being bound in the first instance by its own constitution and will naturally apply instruments which it is itself responsible for administering rather than other instruments with which they may be in conflict, is in itself little more than a truism which is of no assistance to a party to conflicting instruments confronted with the difficulty of reconciling its conflicting obligations. It becomes a valid principle of conflict only when formulated as the proposition that, as a matter of both legal duty and practical common sense, there being no other way in which complete confusion can be avoided, organizations governed by or responsible for the administration of conflicting instruments must, except in so far as another instrument is on the basis of principle or precedent clearly overriding in character, operate provisionally on the basis of their own instruments until the conflict can be dealt with by negotiation, by the acceptance of a recommendation by a body such as the Economic and Social Council or the General Assembly (assented to in so far as necessary by the parties to the instrument) or by an authoritative decision. This proposition implies, of course, that the right of each organization to rely upon and apply its own instruments provisionally must be recognized by the parties and the other organizations concerned. There may be cases in which the conflict cannot be satisfactorily resolved and in which the only reasonable solution is to allow each organization to apply its own instrument, leaving the parties to reconcile any conflict in their obligations by securing release from one or other of their obligations or in some other way. Such a solution, though untidy and possibly inconvenient, is at least a reasonably certain and intelligible one and may accordingly be workable. The same principle may be applicable within certain organizations whose different organs may interpret the basic instrument independently for the purpose of discharging their respective functions and be unable to reconcile their views; this appears to be the position in the United Nations under the Charter.

The autonomous operation principle is no more unqualified than the other principles which we have enunciated. Its application may clearly be limited by that of the hierarchic principle or the *lex specialis* principle, and there may be circumstances in which one of the other principles would prevail over it. To take an extreme, and one may hope theoretical, illustration, a law-making treaty incompatible with the General Treaty for the Renunciation of War would appear to be totally void and incapable of any kind of legal validity even within the framework of the organization sponsoring it. There may be circumstances in which the Charter of the United Nations would prevail over an inconsistent provision of the constitution of another international organization or of a law-making treaty sponsored by

it. One can conceive of circumstances in which a *lex specialis* should be regarded as prevailing over an instrument for the administration of which the organization before which the matter arises is directly responsible. There might be cases in which a *lex prior* could not be disregarded without a breach of good faith, or in which a *lex posterior* introduced in changed circumstances with general acquiescence could not be disregarded without a similar breach of faith. Dogmatism on the subject is out of place; these various considerations all have to be weighed in the light of the circumstances of each case.

(f) *The 'pith and substance' principle.* The Judicial Committee of the Privy Council, in determining the respective jurisdictions of the Dominion of Canada and the Provinces under the British North America Act, evolved what it described as the 'pith and substance' principle as a basis for deciding doubtful cases. Though the principle as applied in Canada originated in an attempt to resolve the difficulties arising from a logically unsatisfactory classification of legislative powers, and the manner in which it was applied in respect of the allocation of particular topics of legislative jurisdiction has been severely criticized, particularly as failing to have sufficient regard to either the original intentions of the Fathers of Confederation or changing economic and social needs, the principle itself would appear to be of unimpeachable validity and to have a significant application to the conflict of law-making treaties. It was stated in Leroy's *Legislative Power in Canada*¹ in the form of two propositions, namely, that subjects which in one aspect and for one purpose fall within the jurisdiction of the provincial legislatures may in another aspect and for another purpose fall within the jurisdiction of the Dominion Parliament,² and that in such cases the true nature and character of the legislation in the particular instance under discussion, its grounds and design and the primary matter dealt with, its object and scope, must always be determined in order to ascertain the class of subject to which it really belongs, and any merely incidental effect it may have over other matters does not alter the character of the law.³ The maze of subsequent case law which has given rise to so much controversy represents little more than the detailed elaboration of these propositions.⁴ The same principle also appears under different guises in other federal systems. Though formulated in Leroy's propositions with reference to conflicts of legislative jurisdiction for the purpose of determining the constitutional validity of legislation enacted by the federal and provincial authorities respectively, the underlying principle applies in much the same manner to conflicts of laws, or of law-making treaties, in which the question at issue

¹ Published in 1897. The expression 'pith and substance' as a convenient shorthand for the principle appears to have secured general currency at a later date.

² Proposition 35, p. 393.

³ Proposition 36, p. 416.

⁴ Cf. Bora Laskin, *Canadian Constitutional Law* (1951).

is which of two conflicting norms really deals with the essentials of the matter and must therefore be regarded as of primary authority. It is perhaps not fanciful to suggest that most of the conflicts and potential conflicts between law-making treaties which are eliminated or resolved by negotiation between the parties and organizations concerned are determined by the conscious or subconscious application of this criterion. In any case in which recommendations on the subject may be made by the Economic and Social Council or the General Assembly it is likely to be regarded as of primary importance. Moreover, intelligently applied, without the handicap of unsatisfactory basic texts and an increasingly complex and unsatisfactory body of judicial precedent, it would appear to be susceptible of evaluation and application by the International Court in a manner which would constitute a healthy corrective to other principles which, having been evolved in other contexts and for other purposes, fail to take account sufficiently of some of the essential elements in the contemporary problem.

(g) *The legislative intention principle.* The general conclusion which emerges from our survey of these various principles is that none of them can be regarded as absolute in character but all may afford useful clues to legislative intention, postulates on the basis of which a legislative intention can reasonably be presumed, or criteria for reconciling or determining the relative priority of conflicting legislative intentions. Other evidence of legislative intention may also be available, in the form of preparatory work (which may in certain cases take the form of understandings between organizations responsible for different instruments) or, particularly in the case of some of the highly technical instruments applicable to modern technological developments, of scientific or other expert evidence in the light of which the relationship between different instruments and the bearing of conflicting provisions on the operation and effectiveness of the instrument in which they appear becomes more intelligible, thus making it easier to reach a practically satisfactory solution. A solution to a conflict deduced from abstract legal principles is always possible when no alternative is available, but in the interest of developing a coherent body of law fully adjusted to changing practical needs recourse to such a process of abstract reasoning should always be regarded as a last resort.

III. *Conclusions*

It remains to formulate in summary form the conclusions to which the foregoing analysis appears to lead:

1. The conflict of law-making treaties, while undesirable and anomalous in principle, is an unavoidable incident of the absence of any overriding international legislative authority, the parallelism of international and regional action, the practical need for a functionally decentralized inter-

national legislative process, and the imperfect development of the law concerning the modification of law-making treaties by revision or amendment.

2. In these circumstances, however, much as we may deplore the existence of the problem, we must for as long a period as it is at present profitable to consider accommodate ourselves to its existence, in a manner similar to that in which, by means of the principles governing the conflict of laws, we accommodate ourselves to the conflicts arising from the coexistence of separate systems of municipal law.

3. The conflict of treaties was discussed in some detail by Grotius, Pufendorf, and particularly Vattel, and later writers have recapitulated with variations Vattel's rules on the question, but no consistent body of principles adapted to modern needs has yet been evolved; more particularly, judicial decisions on the subject are relatively few in number and indecisive. The extent to which the principles applicable to law-making treaties may differ from those applicable to treaties which are primarily contractual in character has not yet received adequate consideration, and in general the subject has suffered from being considered too much in terms of abstract legal principle, primarily as applied to matters having political implications, and too little in terms of the technicalities of the international legislative process and the nature of the practical problems which may arise in the course of applying law-making treaties dealing with interrelated subjects.

4. A conflict of law-making treaties arises only where simultaneous compliance with the obligations of different instruments is impossible. This will be the case primarily in the case of instruments which lay down rules of objective validity as distinct from instruments which embody separable obligations of different parties. There is no conflict if the obligations of one instrument are stricter than, but not incompatible with, those of another, or if it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another; but though there is no conflict in such cases there is a divergence, and such divergence may defeat the object of one or other of the conflicting instruments, either by making one of them practically inoperative or by preventing the attainment of international uniformity.

5. Where the interpretation of a treaty provision is doubtful, there is a presumption that the provision was not intended to be in conflict with the provisions of another law-making treaty of a general character. Similar presumptions exist in respect of statutes and contracts, and the applicability of the same principle to treaties was recognized at an early stage in the development of international law. The presumption is not, however, a *presumptio juris et de jure*, but is rebuttable and may have to be weighed against other presumptions. In these circumstances, it may eliminate certain potential conflicts but cannot eliminate the problem of conflict.

6. A number of procedural precautions are desirable to avoid the occurrence of conflict. The practice of close consultation prior to and during the drafting of instruments between those responsible for the drafting of instruments dealing with related subjects which are negotiated under the auspices of different bodies is of primary importance for this purpose. Such consultations should not be limited to the United Nations group of organizations; close consultation between international and regional bodies which may be dealing with the same subject-matter is particularly important. In some cases the effect of such consultations may be steps to urge wider ratification of, or some appropriate modification of, the terms of an existing instrument rather than the conclusion of a new instrument. In other cases the effect of such consultations may be to redefine the scope of a proposed instrument to avoid conflict with an existing instrument or to incorporate by reference in the proposed instrument certain provisions of the existing instrument.

7. The value of such consultations will depend in large measure on the extent to which those participating in them, and those formulating the national and international policies by which they are guided, form the habit of regarding proposed new instruments from the standpoint of their effect on the international statute book as a whole, cease attempting to appraise their value in isolation from their relationship to other instruments, and resist the temptation to secure fuller satisfaction for their own views on debatable questions of detail at the price of conflict between different instruments and incoherence in the body of related instruments.

8. Considerable improvements in the technical legal equipment available for use in the drafting of international instruments are also desirable; more particularly, a comprehensive edition of current law-making treaties kept regularly up to date and a current register in accessible form indicating the extent to which they are in force, have become indispensable.

9. If these conditions are fulfilled, much can be done to avoid conflict by a sustained effort to secure the inclusion of appropriate provisions in instruments when they are drafted. While the inclusion of such provisions is particularly necessary for the purpose of eliminating potential conflicts between international and regional instruments and potential conflicts arising from the revision of an instrument, they should also be systematically employed to eliminate other types of potential conflict.

10. When a conflict occurs it should be resolved in the first instance by negotiation among the parties and organizations concerned or by utilizing the machinery for the co-ordination of policies provided for in the Charter of the United Nations. Failing settlement in this manner, it would be appropriate to submit it for a judicial determination. The existence of such a conflict cannot be regarded as entitling a party to treat one of the conflicting

instruments as abrogated by violation until the matter has been judicially determined.

11. There are a number of principles which call for consideration when it is necessary to resolve a conflict on a legal basis. These may be distinguished as the hierarchic principle, the *lex prior* principle, the *lex posterior* principle, the *lex specialis* principle, the autonomous operation principle, the 'pith and substance' principle, and the legislative intention principle. None of these principles has any absolute validity or can be applied automatically and mechanically to any particular class of case. They have to be weighed and reconciled in the light of circumstances on the basis of gradually growing experience until the law on the subject reaches a more developed stage of maturity than it has yet attained.

12. The measure of success which is achieved in eliminating and resolving conflicts between law-making treaties will have a major bearing on the prospect of developing, despite the imperfections of the international legislative process, a coherent law of nations adequate to modern needs.

THE ENFORCEMENT OF TAXATION UNDER INTERNATIONAL LAW¹

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THE enforcement of taxation is primarily a matter of domestic law governing a relation between a State and its own subjects. International law may become involved when taxation is enforced by one State against the subject of another. This occurs in two main types of situation: first, where a State enforces taxation against an alien or his property within its own jurisdiction; secondly, where a State enlists the aid of another State in the enforcement of taxation against one who is an alien to either the taxing or the enforcing State or both.² The first situation raises one aspect of the question of enforcement, namely, the redress available to aliens under international law against the enforcement of taxation by the taxing State which has the alien or his property within its jurisdiction. The second situation raises another aspect: the aid available to the taxing State from other States in the enforcement of its taxes. The latter question involves a special rule of private international law which has been subject to frequent attack and a great body of treaty law, created for the most part only in the last few years, which is changing the traditional rule on international co-operation in the enforcement of taxation.

I. *The redress available to aliens against the enforcement of taxation by the taxing State*

The enforcement by a State of its own taxes against aliens takes place in the first instance under domestic law through the enforcement agencies of the taxing State, which in most cases is capable of executing the law without outside assistance because of the presence of the alien or his property within the jurisdiction. Thus the ordinary situation of enforcement of taxation against an alien will involve no question of international law, unless the alien himself should wish to raise it as a defence to payment

¹ The following abbreviations will be used in this article: *A.J.I.L.*—*American Journal of International Law*; *Annual Digest*—*Annual Digest and Reports of Public International Law Cases*; Hackworth, *Digest*—Hackworth, *Digest of International Law*; *I.T.A.*—*International Tax Agreements*, prepared by the United Nations; *L.N.T.S.*—*League of Nations Treaty Series*; Moore, *Digest*—Moore, *Digest of International Law*; *U.N.T.S.*—*United Nations Treaty Series*; *Zeitschrift*—*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*. The standard form of citation is used for British and American cases.

² A distinction must be made between the State levying the tax, which will be called the taxing State, and the State assisting in enforcement, which will be called the enforcing State. The present article does not treat, except incidentally, the legal questions involved in the indirect enforcement of taxation under international law. See on that subject Sack in *University of Pennsylvania Law Review*, 81 (1933), pp. 559-85.

of the tax. The present article is not concerned with substantive defences against taxes levied upon aliens, but deals with the procedural forms of redress available to them under international law for the protection of their rights against the taxing State. There are two main categories of protection which the alien may seek to use, namely, the judicial and quasi-judicial offices of the taxing State, and the diplomatic offices of his own State. In some cases there may also be recourse to the judicial offices of an international tribunal or board of arbitration.

(a) *The judicial offices of the taxing State*

Every tax system provides some form of administrative or judicial machinery for the adjustment of differences between the taxpayer and the State as to the amount of taxation, the manner in which it is collected, and other matters which are likely to become a source of dispute. These facilities are normally open to aliens as well as to the nationals of the taxing State, and upon the same conditions. Any substantial difference between aliens and nationals in this respect to the detriment of the former would constitute unfair discrimination.¹ Moreover, any unjustifiable discrimination between aliens and nationals or between different classes of aliens in the determination of tax disputes would violate applicable treaty provisions for national or most-favoured-nation treatment.² Where the complaint against the tax is based solely upon the municipal law of the taxing State, then its administrative or judicial machinery is the only proper avenue for redress. Proceedings before the appropriate bodies, however, may also be based upon the relevant international law in addition to the domestic tax law of the taxing State.³

It is a well-established rule of international law that the protection of aliens against fiscal exactions contrary to international law lies in the first instance with the organs of the taxing State.⁴ For this reason it is the usual practice that aliens are advised, when they have a complaint about their taxes, to have recourse first to the local remedies and, if necessary, to pay the taxes under protest, taking care that a receipt is given therefor in case of the need for subsequent action.⁵ Normally, payment is required first

¹ See the author's article in this *Year Book*, 29 (1952), pp. 170-1.

² See *ibid.*, pp. 176-85.

³ In some States international law is by constitutional provision a part of the law of the State. See, for example, Article 25 of the Basic Law for the Federal Republic of Germany (the Bonn Constitution) in Peaslee, *Constitutions of Nations*, vol. iii (1950), p. 604. Note, however, the *Reparations Levy* case: *Zeitschrift*, 2 (1930), p. 88; *Annual Digest*, 1927-8, Case No. 225.

⁴ See the note of the United States Assistant Secretary of State to the American Consul at Monterrey, Mexico, in 1870: 'If the State legislature could not authorise the tax in question, it is to be assumed that the judiciary of the country will furnish adequate protection and redress to those who may be aggrieved' (Moore, *Digest*, vol. ii (1906), p. 62).

⁵ See *ibid.*, p. 61. See also *Foreign Relations of the United States*, 1910, p. 230. Aliens are not always advised, however, to conform to the requirements of the local authority. Where war

and judicial proceedings follow. Provided there is no discrimination against him, an alien has no legitimate complaint under international law if he must bear the expense of the proceedings, even though the error is one on the part of the taxing State.¹

Sometimes aliens may have special rights of judicial redress. In the case of *Egypt v. Nicolas Ziutzos*,² the plaintiff, an alien living in Egypt, brought an action against the Egyptian Government for repayment of an allegedly illegal tax upon his property in Egypt. The Mixed Court appointed an expert to ascertain whether the principle of equality of treatment for aliens and nationals had been violated, and upon the basis of the expert's report gave judgment against the Egyptian Government for the amount of the tax deemed to be excessive. On appeal, in answer to a plea to the jurisdiction of the Court, it was held that Egypt was subject to suit in the Mixed Court with regard to any claim of a foreign subject involving an infringement of his acquired rights, which included the right under the Turkish Law of 1867 to hold immovable property upon the same conditions as natives. The judgment of the lower Court was reversed, however, because that Court had exceeded its powers in appointing an expert to inquire into the facts.

(b) *The diplomatic offices of the home State*

An alien may also rely to some extent upon the diplomatic offices of his home State for the protection of his fiscal rights under international law. The local diplomatic establishment of his country will normally give the alien advice at any time, although there is some reluctance to express opinions about purely hypothetical situations.³ Intervention may take place at the local level through the Consul-General or at the national level through the Embassy of the complaining State.⁴ Diplomatic assistance will usually not be granted until there has been a resort to local remedies under the law of the taxing State.⁵ In some instances where executive action is required, as, for example, in the case of repayments of forced loans, diplomatic assistance may supplement resort to local remedies.⁶ It does not follow, however, that diplomatic intervention will always be available if the local remedies are

or revolution has created unsettled conditions, they may be left to decide for themselves whether existing circumstances warrant payment: see *ibid.*, 1915, pp. 979 and 1000-1.

¹ See Moore, *Digest*, vol. ii (1906), p. 57.

² Decided by the Egyptian Court of Appeal: *Gazette des Tribunaux Mixtes d'Égypte*, 18th Year, p. 177, also reported in *Annual Digest*, 1927-8, Case No. 227. See also *Rothschild and Sons v. Egyptian Government: Clunet*, 52 (1925), p. 1091, and 53 (1926), p. 754; *Annual Digest*, 1925-6, Case No. 14.

³ See Moore, *Digest*, vol. ii (1906), p. 55.

⁴ See *ibid.*, pp. 60-61.

⁵ See *ibid.*, p. 61.

⁶ See *ibid.*, p. 66.

not satisfactory to the taxpayer. As the United States Assistant Secretary of State stated to the American Ambassador in Peru:

'In the case of a tax alleged to have been wrongfully imposed by a foreign government upon a citizen of the United States or upon an American corporation, no occasion would arise in general for the intervention of the Department, so long as a judicial remedy for the recovery of the tax was available, nor even after the exhaustion of such remedy, unless such citizen or corporation suffered a denial of justice in the course of its effort to recover the tax.'¹

Where a settlement has been reached which is subsequently violated by the taxing State, it may be expected by the alien that diplomatic support from his home State will be forthcoming.²

On the other hand, if local remedies are obviously inadequate or non-existent, diplomatic intervention will not wait upon them. This is the situation in time of war or revolution, when the normal operation of the administrative and judicial organs of the taxing State has ceased or cannot be depended upon. In such cases the home State of the alien may register a diplomatic protest immediately and advise its nationals to pay the taxes required only if they are insisted upon,³ although in similar cases the aliens have been advised to pay the taxes under protest and to make the payment, as far as possible, a matter of record.⁴

(c) *International adjudication, arbitration, and agreement*

If the resort to local remedies and diplomatic action has failed to produce a satisfactory settlement, there remains the possibility of placing the issue before an international judicial or arbitral body. Such a step would seem to have to follow the exhaustion of local remedies, but this is not always the case. In the case concerning the *Administration of the Prince von Pless* (1933)⁵ Germany, on behalf of a member of the German minority in Polish Upper Silesia, alleged that Polish fiscal authorities had violated Articles 67 and 68 of the Geneva Convention of 1922 concerning Upper Silesia and requested that their acts be pronounced null and void and that the Polish Government indemnify the Prince von Pless for the damage caused by its illegal acts.⁶ Article 72, paragraph 3, of the Geneva Convention provided that in the event of any difference of opinion as to questions of law or fact arising out of the Convention between Poland and another Power which is a member of the Council of the League of Nations, the dispute should be regarded as one of an international character under Article 14 of the

¹ See Hackworth, *Digest*, vol. iii (1942), pp. 576-7.

² See Moore, *Digest*, vol. ii (1906), p. 56.

³ See *Foreign Relations of the United States*, 1914, pp. 769, 772.

⁴ See *ibid.*, 1912, pp. 907-8.

⁵ See *Permanent Court of International Justice*, Series A/B, Nos. 52, 54, 57, and 59.

⁶ The Prince von Pless was a Polish national but a member of the German minority in Upper Silesia whose rights were protected in the Geneva Convention of 1922.

Covenant of the League and referred, on the demand of the other party, to the Permanent Court of International Justice.

Poland objected that the dispute was only between the Polish Treasury and the Prince von Pless as a taxpayer, and could not be brought before the Court until the Prince had exhausted his remedies under Polish law, which had not determined the final decision in the case. Germany, on the other hand, argued that the principle of exhaustion of internal means of redress was inapplicable. The Court declared that a decision on this point was unnecessary on the ground that 'it will certainly be an advantage to the Court, as regards the points which have to be established in the case, to be acquainted with the final decisions of the Supreme Polish Administrative Tribunal. . . .'¹ Nevertheless, the Court held that if the German Government should feel that there was an unwarrantable delay in the delivery of the final opinion of the Polish courts, this point might be argued before the Permanent Court and the Court schedule adjusted according to the decision based upon such argument.²

Moreover, the exhaustion of local remedies does not necessarily mean that the taxing State is free to take further measures against the alien taxpayer or his property as well as to proceed to a final determination of existing issues. Following the preliminary decision of the Court in the case of the *Prince von Pless*, the Polish fiscal authorities presented the Prince with summonses for the payment of several million zlotys in back taxes within a period of fifteen days under pain of constraint of his property. The German Government thereupon applied to the Permanent Court for interim measures of protection. Poland then informed the Court that the summonses, issued by oversight, had been cancelled and that all measures of constraint with respect to the disputed taxes would be suspended pending the decision of the Court.³

In addition to permanent international judicial organs, *ad hoc* bodies may be utilized for the settlement of international fiscal disputes. Such a body may be created in anticipation of fiscal problems from a particular situation, like that established by Article 11 of the Convention of 1923 between Greece and Turkey on the Exchange of Populations,⁴ which was given power to pass on certain claims for the return of revenue by Greece to Moslems⁵ during a limited period of time.⁶ Or machinery for settlement

¹ *P.C.I.J.*, Series A/B, No. 52, p. 16.

² *Ibid.* The Polish Government requested and was granted an extension pending the decision of the Supreme Administrative Tribunal: see *ibid.*, No. 57, pp. 167 ff.

³ *P.C.I.J.*, Series A/B, No. 54, pp. 150 ff.

⁴ See *L.N.T.S.*, vol. 32, p. 81.

⁵ See the Greek Declaration of 1923 relating to Moslem property in Greece: *L.N.T.S.*, vol. 36, p. 155.

⁶ All claims had to be made within six months of the entry into effect of the Peace Treaty of Lausanne, 1923: *ibid.*, vol. 28, p. 11. See further, Ladas, *Exchange of Minorities* (1932), pp. 135-6 and 423-4.

may be established after the dispute has arisen, as in the case of the *Franco-Spanish Arbitration* of 1922 on the *Interpretation of the Convention of 1862* between those two countries exempting nationals of each within the territory of the other from certain taxes.¹ In the former case the adjudication was left to an international Mixed Commission. The latter case was an arbitration by a neutral third party, the President of the Swiss Republic. The Mixed Arbitral Tribunals established in connexion with the enforcement of the Treaties of Peace following the First World War settled a number of tax questions.²

Several international agreements establish special rights of redress for aliens in order to avoid double taxation. When a taxpayer can establish that he has been subjected to double taxation by the revenue authorities of the contracting States, he is entitled to lodge a claim for relief, usually with his home State. If the claim should be deemed worthy of consideration, the fiscal authorities of the two States are to consult for the purpose of avoiding the double taxation in accordance with the Agreement or by some equitable means.³

II. *International co-operation in the enforcement of taxation: customary practice*

Unless the taxing State can enlist the aid of other States, it is limited in the enforcement of taxation to its own jurisdiction. Regardless of any claim to the contrary, no State can, as a practical matter, enforce a tax against persons or property not in some way within its power. This may be illustrated by the case of *Commissioners of Inland Revenue v. Hurn and Warmser*.⁴ In

¹ See *Reports of International Arbitral Awards*, vol. i (1948), pp. 302-5.

² See the cases reported in *Gazette des Tribunaux arbitraux mixtes*, vol. 3 (1924), pp. 1111-12, vol. 5 (1926), p. 1090, and vol. 6 (1927), p. 930. See also the fiscal aspects of the Arbitral Award in the case of the *Free Zones of Upper Savoy and the District of Gex* (1933) in *Reports of International Arbitral Awards*, vol. iii (1949), p. 1455, at p. 1464.

³ For provisions of treaties on income and general property taxes see Article 13 of the Treaty of 1935 between Finland and Germany (*I.T.A.*, vol. i, p. 6); Article 15 of the Treaty of 1936 between France and Sweden (*ibid.*, p. 17); Article 113 of the Treaty of 1946 between the Union of South Africa and the United States of America (*ibid.*, p. 163); Article XVIII of the Treaty of 1948 between New Zealand and the United States (*ibid.*, p. 236); Article XXIV of the Treaty of 1948 between the Netherlands and the United States (*ibid.*, p. 245); Article 25 of the Treaty of 1939 between France and the United States (*ibid.*, p. 95); Article XVI of the Treaty of 1942 between Canada and the United States (*ibid.*, p. 108). For provisions of treaties on succession duties see Article XI of the Treaty of 1949 between Norway and the United States (*ibid.*, vol. ii, p. 198); Article XII of the Treaty of 1950 between Greece and the United States (*ibid.*, p. 205); Article XI of the Treaty of 1944 between Canada and the United States (*ibid.*, vol. i, p. 346); Article XI of the Treaty of 1947 between the Union of South Africa and the United States (*ibid.*, p. 380); Article 14 of the Treaty of 1946 between France and the United States (*ibid.*, p. 371). See also Article VII of the Treaty of 1949 between France and the Netherlands on Extraordinary Capital Levies (*ibid.*, vol. ii, p. 133).

⁴ [1923] 2 K.B. 563; 8 Reports of Tax Cases 466. A third taxpayer, who was a British national, was also involved in the case. This case was followed in *Whitney v. The Commissioners of Inland Revenue*, [1924] 2 K.B. 602.

this case the English High Court of Justice held that the powers of enforcement of British fiscal authorities extended to the service abroad upon non-resident aliens of a notice to make a return of income for the purpose of British super-tax and of a notice of assessment to super-tax. The taxpayers were directors of a British company and recipients of income subject by deduction to British income tax. Both were foreigners, resident in Paris and with no residence in Great Britain. When they failed to respond to notices requiring them to make returns of their income, the Commissioners sent them notices of assessment at their Paris addresses, which they then contested as invalid. The Court held that 'anybody in the wide world, wherever he is' who is chargeable to the tax is bound under English law to make a return and that there is no principle of international law to the contrary, even though the taxpayer may be an alien. It is clear, however, that the Court did not mean to include 'anybody in the wide world' within the scope of Britain's taxing power except in so far as he should be subject to British jurisdiction. For there is no way in which the British authorities could possibly compel even the filing of a tax return without having jurisdiction over the taxpayer or some property or interest of his against which enforcement could be directed.¹

Furthermore, a State may not extend its fiscal system into another State by making collection agents of its representatives there. In 1937 the President of Mexico decreed a tax upon the income of persons sending goods into Mexico, part of which was to be collected in advance by the payment to the Mexican consulate of 3 per cent. of the value of the goods. The United States pointed out that 'other countries having an income tax law are confronted with the problem of collection of taxes imposed on profits incident to the shipment of goods into the country, but, as far as is known, it is unprecedented for one country to attempt to collect such taxes in the territory of the other country through its own agents operating in that country'.² The United States informed Mexico that it regarded the action of Mexico as constituting in effect the establishment of a part of the Mexican fiscal system in the United States and that such action was in derogation of its sovereignty. In 1938 the Mexican Government decided to cancel the tax.³ Being powerless to enforce its tax laws outside its own jurisdiction,

¹ Note also that where the tax has already been paid to the fiscal authorities of one State and an action is brought in another State which is based upon a contractual right to recover the amount of the tax from a person who is an alien to the taxing State, recovery will be allowed: *Ilgovski v. Shprinski*, Palestine Law Reports, 9 (1942), p. 324; *Annual Digest*, 1941-2, Case No. 6.

² See Hackworth, *Digest*, vol. ii (1941), pp. 315-16.

³ See *ibid.* Cf. the establishment of French revenue officials in the Free Zones of Gex and Upper Savoy to ensure the collection of French internal taxes (*B. and C. v. Administration des Douanes: Annual Digest*, 1935-7, Case No. 60, Note.) The situation discussed in the text is to be distinguished from the case where the local sovereign is compelled, usually by the existence of special treaty rights, to enforce its own tax laws against aliens through the consulates of the States of the aliens subjected to the tax. Thus, when Americans in Tangier refused to pay the

the taxing State must thus seek the aid of other States for this purpose, either under their customary private international law or by virtue of some treaty provision.

(a) *The customary rule and its origin*

It has long been held to be a fundamental rule of private international law that one State will not enforce the revenue laws of another.¹ The origin of this rule dates back to several cases in the latter part of the eighteenth century which have remarkably little bearing upon the question. In *Boucher v. Lawson*,² it was held that a Portuguese Law prohibiting the export of gold was not a sufficient defence to an action by the plaintiff against the master of a Portuguese ship in London to compel delivery of the gold. In *Holman v. Johnson*,³ Lord Mansfield held that a foreign seller of tea, which subsequent to its sale in France was smuggled into England by the purchaser with the knowledge but without the participation of the seller, could recover in England in an action upon the foreign contract of sale because delivery of the tea had been made in France and the seller had no part in the scheme to violate English revenue laws. In the course of his opinion upholding the validity of the contract, Lord Mansfield stated that '... no country ever takes notice of the revenue laws of another'. In *Planche v. Fletcher*,⁴ which was an action upon insurance on goods shipped to France but sent ostensibly to Ostend in order to avoid French taxes, Lord Mansfield held that there was no fraud upon the underwriters in England despite the false statement of destination and remarked: 'One nation does not take notice of the revenue laws of another.'

It is at once apparent that neither of these cases supports the extravagant *dictum* of Lord Mansfield⁵ and that both are only remotely relevant to the contemporary problem of international co-operation in the enforcement of taxation. Nevertheless, slavish repetition and indiscriminate application of these authorities have produced the prevailing rule that no State will enforce the revenue laws of another. Hence a State cannot maintain any action in the courts of another State upon a tax claim⁶ or to enforce

taxe urbaine, the municipal authorities had to request the Consul General of the United States to enforce the tax: see Hackworth, *Digest*, vol. ii (1941), pp. 538-9. Cf. Article 6 of the Treaty of 1919 between Greece and Spain: *L.N.T.S.*, vol. 3, p. 85.

¹ See Dicey's *Conflict of Laws* (6th ed. by Morris, 1949), pp. 152, 154-5 and 408-9; Goodrich, *Conflict of Laws* (1949), § 214; Wortley in *Recueil des Cours*, 67 (1939), pp. 413-19; Beale, *The Conflict of Laws*, vol. iii (1935), pp. 1633-8.

² (1734), Cas. t. Hard. 85.

³ (1775), 1 Cowp. 341.

⁴ (1779), 1 Doug. K.B. 251.

⁵ In *Alves v. Hodgson* (1797), 7 Term. Rep. 241, Lord Kenyon refused to allow recovery upon a promissory note not stamped in accordance with the revenue law of the country where it was made, thus establishing the principle that for some purposes, at least, courts will take notice of the revenue laws of foreign States. See also *Clegg v. Levy* (1812), 3 Camp. 166; *James v. Catherwood* (1823), 3 Dowl. & Ry. N.P. 190; and *Bristow v. Sequeville* (1850), 5 Exch. 275.

⁶ See *Municipal Council of Sydney v. Bull*, [1909] 1 K.B. 7; *Attorney-General for Canada v.*

a tax judgment which has already been rendered upon a tax claim.¹ Accordingly, under customary practice an alien may not be subjected to the tax laws of any State other than the State which is the enforcing agent, even if the other State is his homeland.² *In re Delhi Electric Supply and Traction Co., Ltd.*,³ represents the latest expression of the rule. In this case the Government of India sought to prove in the voluntary liquidation of a United Kingdom company trading in India for a sum due under Indian income tax for the company's activities in India. After reviewing the authorities the Court of Appeal, *per* Lord Evershed, held that a foreign State could not enforce its revenue laws in England and that a member of the British Commonwealth would for this purpose be regarded in the same manner as a foreign State.

(b) *The justification of the customary rule*

It is questionable whether this traditional attitude of uncompromising hostility towards the revenue laws of other States is justifiable.⁴ Although the rule is now well established, the reasons of policy adduced to support it are far from convincing. Lord Evershed has stated them in the last-cited case as follows:

'On general principles both of justice and convenience there is, to say the least, much to commend the rule as I have stated it, though, undoubtedly, there may be hard cases, of which the present case may well be one. If there were no such rule the result, it seems to me, would be that all revenue claims would become liable to be enforced in other countries.'⁵

It is difficult to understand why this result should be regarded as such a dire possibility. What 'justice' is there in facilitating fiscal evasion by itinerant taxpayers? To be sure, no State would wish to lend its courts to the enforcement of foreign tax laws which are unjust, oppressive, or contrary

William Schulze and Co. (1901), 9 Sc. L.T. Rep. 4; *The Eva*, [1921] P. 454; *Lambertini v. Mauvrodís*, *Rivista italiana di diritto internazionale privato e processuale* (1932), p. 61, reported in *Annual Digest*, 1931-2, Case No. 77; *Bergen v. Olsen*, *Ugeskrift for Retsvæsen* (1925), pp. 176 ff., reported in *Annual Digest*, 1923-4, Case No. 147; *Norwegian Department of Finance v. Nielsen*, *Ugeskrift for Retsvæsen* (1923), pp. 301 ff., noted in *Annual Digest*, 1923-4, p. 264, *A.J.I.L.* (1932), Suppl., pp. 497-8. See also *Caisse Générale Locale de Secours contre la Maladie de la Commune de Jülich et Al. v. S.A. des Ateliers de Godarville, Clunet*, 57 (1930), p. 1097, reported in *Annual Digest*, 1929-30, Case No. 63; *King of the Hellenes v. Bostrom et Al.*, 16 Lloyd's List Law Reports 168, reported in *Annual Digest*, 1923-4, Case No. 81. See also Kuhn, *Comparative Commentaries on Private International Law* (1937), pp. 46-47.

¹ *Norway v. Bruhn*, *Nytt Juridiskt Arkiv*, 1924, p. 635, reported in *Annual Digest*, 1923-4, Case No. 148; but see Dicey's *Conflict of Laws* (6th ed. by Morris, 1949), pp. 408-9; Beale, *The Conflict of Laws*, vol. ii (1935), p. 1410; *Restatement on the Conflict of Laws* (1934), §§ 443 and 610, and Suppl. (1948), § 610.

² See *In re Visser*, *Queen of Holland v. Drukker*, [1928] 1 Ch. 877, reported in *Annual Digest*, 1927-8, Case No. 18.

³ [1953] 3 W.L.R. 1085. Leave has been granted to appeal to the House of Lords.

⁴ The rule prohibits the enforcement of all foreign revenue laws, which would include tax laws and other revenue measures. The present article is concerned only with taxation, and when reference is made to revenue it is only in that sense.

⁵ [1953] 3 W.L.R. 1085, at p. 1091.

to public policy. Nevertheless, it is already a well-recognized rule that no such foreign law will be enforced.¹ The effect of the present rule can hardly be said to have produced 'justice' in any of the leading cases. As for 'convenience', it may well be argued that the application of difficult foreign tax laws could constitute a heavy burden upon already overburdened courts. Yet the application of foreign law would not be a new experience for courts, since conflict of laws rules often require it. Moreover, the objection would not apply to the enforcement of judgments which have been rendered upon tax claims by courts of the taxing State and then sued upon in another State. There is no reason to apprehend a deluge of foreign tax claims which the domestic courts of any particular State would be unable to handle. In the unlikely event that the burden prove to be too heavy, however, reasonable limits could be imposed. Finally, international co-operation in the enforcement of tax laws could be conducive to improved relations between States.

The rule against the enforcement of foreign revenue laws is occasionally supported by analogy with the well-established rule against the enforcement of foreign penal laws.² Whatever may be the justification for the latter rule, the analogy is not an apt one. A tax is not a penalty but a duty; it is imposed not as a punishment but as a civic obligation.³ Consequently, the rule applicable to the enforcement of foreign penal laws can have no bearing on the enforcement of foreign tax laws except to the extent that the foreign taxation is in reality a pecuniary punishment or to the extent that it represents fines or other penalties for non-payment.⁴

(c) *The modern trend against the rule*

The prevailing view against the enforcement of foreign revenue laws has long been subject to criticism⁵ and in recent years there have been signs that it is weakening. In the United States, where the rule had hitherto been assumed to apply among the States,⁶ the question was first left open

¹ See Dicey's *Conflict of Laws* (6th ed. by Morris, 1949), pp. 17 ff., and Beale, op. cit., vol. iii (1935), pp. 1647 ff.

² See Dicey's *Conflict of Laws* (6th ed. by Morris, 1949), pp. 17 ff., 152 ff.; and Beale, op. cit., vol. ii (1935), pp. 1408 ff. See also the argument of Lord Simon (then Mr. Simon, K.C.) in *Sydney Municipal Council v. Bull*, [1909] 1 K.B. 7, at p. 10, and his reliance upon *Huntington v. Attrill*, [1893] A.C. 153, at p. 157.

³ See *Milwaukee County v. White Co.* (1935), 296 U.S. 268, 271.

⁴ See *Wisconsin v. Pelican Insurance Co.* (1888), 127 U.S. 265, 291, and *Gulledge Bros. Lumber Co. v. Wenatchee Land Co.* (1913), 122 Minn. 266.

⁵ See Story, *Conflict of Laws* (8th ed., 1883), § 257; Piggott, *Foreign Judgments*, vol. i (3rd ed., 1908), pp. 92-94; Wheaton, *Elements of International Law* (1866), in *Classics of International Law* (1936), pp. 125-6; Wharton's *Conflict of Laws* (3rd ed., 1905), p. 1139; *Columbia Law Review*, 29 (1929), p. 783.

⁶ See Beale, op. cit., vol. iii (1935), pp. 1635-8, and cases cited therein; 65 A.L.R. 1360; 165 A.L.R. 796; *Henry v. Sargeant* (1843), 13 N.H. 41; *Colorado v. Harbeck* (1921), 232 N.Y. 71. See also Leflar in *Harvard Law Review*, 46 (1932), pp. 193 ff.

in *Moore v. Mitchell*¹ whether a federal court in one State could enforce the revenue laws of another State,² and then it was held in *Milwaukee County v. White Co.*³ that one State was compelled under the 'full faith and credit' clause of the federal constitution⁴ to enforce a tax judgment rendered in another State.⁵

In *State ex rel. Oklahoma Tax Commission v. Rodgers*⁶ the doctrine of non-enforcement of the revenue laws of other States was completely repudiated. After an exhaustive examination of the English and American authorities and various considerations of policy, the Court concluded that the doctrine was erroneous and undesirable and held that the State of Missouri would enforce the income tax law of Oklahoma against former residents of the latter State present in Missouri. This decision is especially significant because it is not based upon the 'full faith and credit' clause of the United States Constitution. 'The simplest ideas of comity would seem to compel such a result', said the Court, 'and modern conditions demand it.'⁷ Moreover, it should be noted that the action was not based upon a tax judgment already rendered, but constituted an original tax suit. In *State of Ohio v. Arnett*⁸ the State of Kentucky approved 'the modern trend as enunciated by the Missouri Court in the well-reasoned opinion in the *Rodgers* case',⁹ and other American decisions, both State and federal, have pointed in the same direction.¹⁰ In other cases the view of the *Rodgers* case has been rejected.¹¹

The American Law Institute has also abandoned the old view. Its *Restatement on the Conflict of Laws*, which at first laid it down that no action could be maintained by a foreign State to enforce its revenue laws or its claims for taxes,¹² even when a judgment thereon had already been rendered in the taxing State,¹³ has withdrawn from this position to leave the question open.¹⁴ Indeed, the *Restatement* goes so far as to say that if a position were

¹ (1929), 281 U.S. 18.

² *Ibid.*, at p. 24.

³ (1935), 296 U.S. 268. Note, however, *People v. Bruce* (1942), 129 F.2d 421. See also *Commonwealth of Massachusetts v. Davis* (1942), 160 S.W. 2d 543, 550, affirmed, 168 S.W. 2d 226.

⁴ Article 4 (1) of the United States Constitution provides: 'Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State.'

⁵ See *New York v. Coe Manufacturing Co.* (1934), 112 N.J. 536.

⁶ (1946), 193 S.W. 2d 919.

⁷ *Ibid.*, at p. 927.

⁸ (1950), 234 S.W. 2d 722.

⁹ *State of Ohio v. Arnett* (1950), 234 S.W. 2d 722, at p. 726.

¹⁰ See *Standard Embossing Co. v. American Salpa Corp.* (1933), 113 N.J. Eq. 468; *J. A. Hols-houser Co. et al. v. Gold Hill Copper Co.* (1905), 138 N.C. 248; *Massachusetts v. Missouri* (1939), 308 U.S. 1, 19-20.

¹¹ *City of Detroit v. Proctor* (1948), 5 Terry 193; *Wayne County v. American Steel Export Co., Inc.* (1950), 277 App. Div. (N.Y.), 585; *Wayne County v. Foster & Reynolds Co.* (1950), 277 App. Div. (N.Y.), 1105. In a number of cases enforcement of the foreign tax has been refused on other grounds. See *State of California v. St. Louis Union Trust Co.* (1953), 260 S.W. 2d 821; *State of Minnesota v. Karp* (1948), 84 Ohio App. 51; *City of Detroit v. Gerard Packing Co.* (1948), 161 Pa. Super. 607. See also *In re Spitzer's Estate* (1932), 170 Misc. 160.

¹² See *Restatement* (1934), § 610.

¹⁴ See *ibid.*, Suppl. (1948), § 610.

¹³ See *ibid.*, § 443.

to be taken on the question, one contrary to that originally taken would seem desirable.¹ Moreover, the most recent edition of Dicey's *Conflict of Laws* indicates that it may be receding from the earlier view against the enforcement of foreign tax claims.² The rule against the enforcement of foreign tax claims is referred to as 'anachronistic', and Australian authority is cited for the proposition that under the 'full faith and credit' clause of the Australian Constitution, as under the American, the tax judgments of each State will be enforced by the others.³ In Great Britain, there has been no such marked departure from the traditional rule. *In re Delhi Electric Supply and Traction Co., Ltd.*⁴ reaffirms the early doctrine. Nevertheless, a number of cases in recent years, although not involving the precise point at issue, have reflected the growing tendency to adopt a co-operative rather than an unhelpful attitude towards the revenue laws of other States.⁵

III. *International co-operation in the enforcement of taxation: treaty law*

The hostility of customary international law towards international co-operation in the enforcement of fiscal obligations has led to the development, especially in recent times, of a body of conventional international law designed to change the customary rules. Chiefly in the form of bilateral treaties, these agreements have facilitated the international enforcement of fiscal laws primarily in three ways: through extradition, collaboration in collection, and exchange of information.⁶

¹ See *Restatement*, Suppl. (1948), § 610. The *Restatement* has also abandoned its earlier view that a foreign tax judgment would not be enforced: see *ibid.*, § 443.

² See Dicey's *Conflict of Laws* (6th ed. by Morris, 1949), pp. 154-5.

³ See *ibid.*, pp. 408-9.

⁴ [1953] 3 W.L.R. 1085. See the discussion *supra*, p. 462.

⁵ See, for example, *Foster v. Driscoll*, [1929] 1 K.B. 470, and *Ralli Brothers v. Compañía Naviera Sota y Aznar*, [1920] 2 K.B. 287. See also *Emperor of Austria v. Day* (1861), 3 De G. F. & J. 217. See, further, Halsbury's *Laws of England*, vol. vi (2nd ed., 1932), p. 273. But note the opinion of Lord Evershed in *In re Delhi Electric Supply and Traction Co. Ltd.*, [1953] 3 W.L.R. 1085, at pp. 1101-2.

⁶ There are many other treaties which, directly or indirectly, have the effect of enforcing the tax laws of the parties. A once commonly used clause, which now seems to have gone out of use, provided that if the merchants, manufacturers, &c., of one State could prove by the production of a standard-type card that they had, *inter alia*, paid all their taxes in their home State, they would be granted various favours in the other State: see Article 1 of the Treaty of 1922 between Finland and Germany, *L.N.T.S.*, vol. 19, p. 93. Payment of taxes is often made a condition precedent to the execution of international agreements, such as those for the release of assets (see Article 2 of the Treaty of 1946 between Denmark and India, *U.N.T.S.*, vol. 7, p. 312) or for exchange of population (see Ladas, *Exchange of Minorities* (1932), p. 248). Other special arrangements for enforcement may be made: see Article 6 of the Treaty of 1919 between Greece and Spain, *L.N.T.S.*, vol. 3, p. 85. See also *League of Nations Official Journal*, 1937, pp. 138-41; 1938, pp. 169 ff.; 1939, p. 122; *League of Nations Supplement*, 1937, Special Supplement No. 171, p. 99.

(a) *Extradition*¹

In conformity with the general opposition to recognition or enforcement of foreign revenue laws, extradition for fiscal offences has been infrequent in relations among States.² The International Congress of Comparative Law in 1932 approved the prevailing practice by adopting a resolution opposed to extradition for fiscal infractions.³ On the other hand, the retreat from unqualified hostility towards foreign revenue laws has been accompanied by growing favour towards the use of extradition in fiscal matters.⁴

1. *Treaty provisions.* The Harvard Research on Extradition showed that of the extradition treaties in force at the time of its publication, some specifically included fiscal offences, others excluded them, either specifically or by failing to list them among offences to which the treaty applied, and many, if not most, treaties of extradition were framed in general terms which appeared to indicate that they could be applied to fiscal offences.⁵ The treaties published in the *Treaty Series* of the League of Nations and the United Nations since the publication of the Harvard Research also indicate the applicability of certain extradition treaties to fiscal offences. Of thirteen recently concluded treaties on extradition, two explicitly excluded the application of the treaty to fiscal offences,⁶ five failed to include fiscal offences among those offences listed as extraditable,⁷ five failed to exclude fiscal offences from general language including them,⁸ and one specifically included

¹ Extradition for fiscal offences may constitute tax enforcement against aliens in two ways. First, the taxpayer may be an alien to the extraditing State, and in most cases probably will be, since States usually reserve the right in treaties on extradition not to extradite their own nationals. See, for example, Article IV (e) of the Treaty of 1932 between Colombia and Cuba, *L.N.T.S.*, vol. 174, p. 79; Article I of the Treaty of 1938 between Brazil and Bolivia, *U.N.T.S.*, vol. 54, p. 346; Article I of the Treaty of 1946 between Iraq and Turkey, *ibid.*, vol. 37, p. 389; Article I of the Treaty of 1938 between Mexico and the United States, *L.N.T.S.*, vol. 198, p. 412.

Secondly, the taxpayer may be an alien to the State requesting extradition. It is also possible that the taxpayer may be an alien to both States. In the unlikely event that he is a national of both States, there would be no question of fiscal enforcement against aliens.

² See 'Harvard Research on Extradition', in *A.J.I.L.* 29 (1935), Suppl., p. 229.

³ *Ibid.*

⁴ *Ibid.*, pp. 232-6; Travers, *Droit Pénal International*, vol. iv (1920), p. 615; and the same, *L'Entr'Aide Répressive Internationale* (1928), pp. 110-12.

⁵ See 'Harvard Research on Extradition', *loc. cit.*, pp. 234-6.

⁶ See Article 4 (d) of the Treaty of 1935 between Estonia and Italy, *L.N.T.S.*, vol. 185, p. 289; Article 3 (2) of the Treaty of 1937 between Poland and Switzerland, *ibid.*, vol. 195, p. 299.

⁷ See Article 2 of the Treaty of 1934 between Albania and Czechoslovakia, *L.N.T.S.*, vol. 188, p. 257; Article II of the Treaty of 1936 between Liechtenstein and the United States, *ibid.*, vol. 183, p. 182; Article 2 of the Treaty of 1936 between Belgium and Liechtenstein, *ibid.*, vol. 186, p. 48; Article 2 of the Treaty of 1938 between Belgium and Turkey, *ibid.*, vol. 198, p. 185; Article 2 of the Treaty of 1938 between Belgium and Mexico, *ibid.*, vol. 198, p. 412.

⁸ See Articles II and III of the Treaty of 1932 between Chile and Colombia, *L.N.T.S.*, vol. 174, p. 77; Articles II and IV of the Treaty of 1935 between Brazil and Chile, *ibid.*, vol. 181, p. 307; Articles 1 and 3 of the Treaty of 1937 between Greece and Luxembourg, *ibid.*, vol. 193, p. 153; Articles II and III of the Treaty of 1938 between Bolivia and Brazil, *U.N.T.S.*, vol. 54, p. 347; Articles 2 and 4 of the Treaty of 1946 between Iraq and Turkey, *ibid.*, vol. 37, p. 389.

a particular kind of fiscal offence.¹ Of six treaties maintained in force, three failed to include fiscal offences among those listed as extraditable,² two specifically excluded fiscal offences,³ and one failed to exclude fiscal offences from general language including them.⁴ Thus the usefulness of extradition for the enforcement of fiscal laws cannot be dismissed, as it has sometimes been.⁵

2. *Interpretation.* An important question in determining the applicability to fiscal offences of treaty provisions on extradition is whether fiscal offences may be said to be included in the general language so often used in such provisions. In this connexion it is interesting to note the decision of the Italian Court of Cassation in *In re Nessim*.⁶ The point at issue was whether the Italo-Turkish Extradition Treaty of 1926⁷ required extradition for violation of the Turkish revenue laws. The accused had exported opium from Turkey to a destination other than that to which he had official permission to send the opium, thus violating Article 16 of Turkish Law No. 2253. Article 2 of the Treaty provided for extradition for 'common crimes', subject to the restriction in Article 4 that extradition should not be granted in the case of political crimes and other offences. The Court held that extradition must be granted since 'common crimes' included violations of the revenue laws.

(b) *Collaboration in collection*

Short of extradition, States may collaborate in the collection of their respective tax claims by rendering each other assistance in the actual execution of tax measures, that is, in the various processes of compulsion necessary for the collection of taxes. Provisions for this kind of assistance are found in two types of treaties: primarily, in special treaties for international administrative assistance in fiscal matters, and, to some extent, in more general treaties on the control of double taxation, both of which are

¹ Article 3 of the Treaty of 1942 between Kuwait and Saudi Arabia includes smuggling, *U.N.T.S.*, vol. 10, p. 100.

² See Article 2 of the Treaty of 1924 between Bulgaria and the United States, *L.N.T.S.*, vol. 26, p. 28, supplemented in 1934, *ibid.*, vol. 161, p. 409, maintained in force, 1948, *U.N.T.S.*, vol. 29, p. 101; Article 2 of the Treaty of 1932 between Austria and Belgium regarding the Belgian Congo and Ruanda-Urundi, *L.N.T.S.*, vol. 129, p. 143, maintained in force, 1949, *U.N.T.S.*, vol. 48, p. 107; Article II of the Treaty of 1924 between Roumania and the United States, maintained in force, 1948, *ibid.*, p. 36.

³ See Article 3 of the Treaty of 1925 between Czechoslovakia and Roumania, *L.N.T.S.*, vol. 54, p. 51, maintained in force, 1948, *U.N.T.S.*, vol. 26, p. 109; Article 3 of the Treaty of 1926 between Bulgaria and Czechoslovakia, *L.N.T.S.*, vol. 60, p. 169, maintained in force, 1948, *U.N.T.S.*, vol. 26, p. 115.

⁴ See Articles 2 and 5 of the Treaty of 1922 between Czechoslovakia and Italy, *L.N.T.S.*, vol. 55, p. 171, maintained in force, 1948, *U.N.T.S.*, vol. 26, p. 103.

⁵ See 'International Enforcement of Tax Claims', in *Columbia Law Review*, 50 (1950), p. 492.

⁶ *Foro Italiano*, 64 (1939), ii, p. 289; *Annual Digest*, 1938-40, Case No. 151.

⁷ *British and Foreign State Papers*, vol. 130, p. 855.

based upon models prepared by the League of Nations. The former usually extend to all persons except nationals of the enforcing State¹ who are domiciled there and thus include most aliens,² although some are more restrictive, extending only to nationals of the applying State or persons domiciled there.³ The latter may extend only to nationals of the applying alien State,⁴ to anyone but nationals of the enforcing State,⁵ or to all persons without limitation.⁶ These treaties are thus of interest with regard to the taxation of aliens not only because their provisions may extend to persons who are aliens in relation to the applying State, but also because they illustrate how persons may be subjected to the tax laws of their own State through the enforcement process of another State to which they are alien.

1. *Special treaties.* The special agreements between States for international administrative assistance in fiscal matters frequently contain, in addition to a general provision for mutual assistance in the collection of taxes,⁷ a provision to the effect that the authority to which the request for enforcement under the treaty is made must comply with the request and

¹ The terms 'enforcing State' and 'applying State' will be used hereafter to denote, respectively, the State to which an application for enforcement is made, and the State which is making the application.

² Nationals of the enforcing State who are domiciled there may also be subject to the provisions for assistance if the tax claim relates to (1) a time when the taxpayer was a national of the applying State or had a permanent residence or business establishment there; or (2) cases of double taxation alleviated by a treaty between the two States. See Article 14 of the Treaty of 1935 between Finland and Germany, *I.T.A.*, vol. i, p. 387; Article 14 of the Treaty of 1940 between Germany and Yugoslavia, *ibid.*, p. 411.

³ See Article III of the Treaty of 1943 between Finland and Sweden, *I.T.A.*, vol. ii, p. 219, and Article III of the Treaty of 1949 between Norway and Sweden, *ibid.*, p. 222.

⁴ See Article 21 of the Treaty of 1936 between France and Sweden on Direct Taxes, *I.T.A.*, vol. i, p. 19; Article XVII of the Treaty of 1939 between Sweden and the United States on Income and Other Taxes, *ibid.*, p. 85; Article 8 of the Treaty of 1936 between France and Sweden on Succession Duties, *ibid.*, p. 338.

⁵ For provisions of treaties on income and general property taxes see Article XVII of the Treaty of 1948 between Belgium and the United States, *I.T.A.*, vol. ii, p. 36; Article XVII of the Treaty of 1949 between Norway and the United States, *ibid.*, p. 58; Article XIX of the Treaty of 1950 between Greece and the United States, *ibid.*, p. 83; Article XXI of the Treaty of 1950 between the Netherlands and Norway, *ibid.*, p. 125; Article XXII of the Treaty of 1948 between the Netherlands and the United States, *ibid.*, vol. i, p. 245; Article XVIII of the Treaty of 1948 between Denmark and the United States, *ibid.*, p. 252.

For provisions of treaties on succession duties see Article I of the Protocol of 1948 to the Treaty of 1946 between France and the United States, *ibid.*, p. 374; Article IX of the Treaty of 1949 between Norway and the United States, *ibid.*, vol. ii, pp. 197-8; Article IX of the Treaty of 1950 between Greece and the United States, *ibid.*, p. 204.

⁶ For provisions of treaties on income and general property taxes see Article XV of the Treaty of 1946 between the Union of South Africa and the United States, *I.T.A.*, vol. i, p. 163; Chapter II of the Treaty of 1948 between France and the Saar, *ibid.*, p. 222; Article XVII of the Treaty of 1948 between New Zealand and the United States, *ibid.*, p. 236.

For provisions of treaties on succession duties see Article VIII of the Treaty of 1947 between the Union of South Africa and the United States, *ibid.*, vol. i, p. 380. See also Article 3 of the Treaty of 1948 between Czechoslovakia and France on Extraordinary Taxes, *ibid.*, vol. ii, p. 129.

⁷ See Article 1 of the Treaty of 1943 between Finland and Sweden, *I.T.A.*, vol. ii, p. 219; Article 1 of the Treaty of 1949 between Norway and Sweden, *ibid.*, p. 222.

employ the same means of compulsion for that purpose which would be used in enforcing similar action under the authority of the enforcing State.¹ Although the procedure used may be a special form of procedure on the request of the applying State, it must be in accordance with the laws of the enforcing State.² No form of compulsion may be used by the enforcing State unless the applying State would be in a position to use similar means of compulsion if a request were addressed to it,³ and unless sufficient possibilities of execution do not exist in the applying State.⁴

On the request of the applicant State notice must be given of the time and place of the proceedings to be taken, and interested parties are entitled to be represented according to the law of the enforcing State.⁵ In the Treaties of Sweden with Finland and Norway it is provided that at the request of either party a tax claim of one State shall be set off in the other State to the extent of the amount recovered.⁶

Specific provisions cover various aspects of the enforcement procedure. The tax decisions, judgments, decrees, or orders of one State are enforceable in the other State on the condition that they are officially recognized by the applying State and possess a certain degree of finality. The condition of finality may be that the action is 'not appealable',⁷ *res judicata* and 'executory',⁸ or 'final',⁹ but it is not clear precisely what these provisions mean in terms of the domestic law of the contracting States, which may raise numerous obstacles to enforcement, particularly on the point of the conclusiveness to be attached to the foreign tax orders.¹⁰ It is not uncommon

¹ See Article 8 of the Treaty of 1935 between Finland and Germany, *I.T.A.*, vol. i, p. 386; Article 17 of the Treaty of 1938 between Italy and Roumania, *ibid.*, vol. ii, p. 213.

² *Ibid.* See also Article X of the Treaty of 1943 between Finland and Sweden, *I.T.A.*, vol. ii, p. 220, and Article XIII of the Treaty of 1949 between Norway and Sweden, *ibid.*, p. 223.

³ See *supra*, n. 1. See also Article X of the Treaty of 1943 between Finland and Sweden, *I.T.A.*, vol. ii, p. 220.

⁴ See Point 8 of the Final Protocol of the Treaty of 1935 between France and Germany, *I.T.A.*, vol. i, p. 390; Point 4 of the Final Protocol of the Treaty of 1943 between Finland and Sweden, *ibid.*, vol. ii, p. 221; Article XIV of the Treaty of 1949 between Norway and Sweden, *ibid.*, p. 223.

⁵ See *supra*, n. 1. It is also provided in some treaties that the measures of execution taken thereunder shall be taken without an exequatur. See Point 6 of the Final Protocol of the Treaty of 1937 between Germany and Roumania, *I.T.A.*, vol. i, p. 397; Point 5 of the Final Protocol of the Treaty of 1937 between Hungary and Roumania, *ibid.*, p. 401; Point 5 of the Final Protocol of the Treaty of 1938 between Italy and Roumania, *ibid.*, vol. ii, p. 215.

⁶ See Articles XI and XII of the Treaty of 1943 between Finland and Sweden, *I.T.A.*, vol. ii, p. 220, and Articles XIII and XVI of the Treaty of 1949 between Norway and Sweden, *ibid.*, pp. 223-4.

⁷ See Article 11 of the Treaty of 1935 between Finland and Germany, *I.T.A.*, vol. i, p. 387, but note Point 2 of the Exchange of Notes of 1936 between the same countries, *ibid.*, p. 390; Article 11 of the Treaty of 1940 between Germany and Yugoslavia, *ibid.*, p. 411.

⁸ See Article 9 of the Treaty of 1937 between Germany and Roumania, *I.T.A.*, vol. i, p. 395; Article 9 of the Treaty of 1937 between Hungary and Roumania, *ibid.*, p. 399; Article 9 of the Treaty of 1938 between Italy and Roumania, *ibid.*, vol. ii, p. 213.

⁹ See Article 10 of the Treaty of 1938 between Germany and Italy, *I.T.A.*, vol. i, p. 403.

¹⁰ See, for example, the discussion of some of the difficulties in American law in 'International Enforcement of Tax Claims', in *Columbia Law Review*, 50 (1950), pp. 496-8.

for the treaties under discussion to provide that dispositions of a less definitive character than those mentioned may also serve as the basis for international enforcement proceedings.¹

Where the legal disposition of the applying State lacks the requisite degree of finality for enforcement in the enforcing State, enforcement may still be aided through the requirement of provisional guarantees of some sort from the taxpayer, such as sequestration of property or posting of security.² Several treaties provide, however, that the treaties are not applicable 'to orders for distraint in matters of taxation',³ to 'cases of arrest'⁴ or to 'warrants for arrest'.⁵ Furthermore, no preference may be given to the fiscal claims in the enforcing State.⁶ Almost every one of the special treaties contains specific provisions on the service of documents.⁷

The Treaty of 1945 between France and Monaco and the accompanying Protocols and Notes⁸ are especially interesting. In these Agreements Monaco undertakes a substantial revision of her domestic law to facilitate the enforcement of French taxes, even permitting French officials to be attached to the tax service of Monaco.⁹ In return, the French Government, *inter alia*, renounce all claims to the indemnity of 500 million francs which it considered the Monégasque Government to owe it for losses caused to the French Treasury through fiscal fraud by persons and companies established in Monaco.¹⁰

2. *General treaties.* The provisions referring to collection in the more general treaties on double taxation and fiscal evasion are less frequent and less extensive, usually being contained in a single Article. They also appear somewhat weaker by comparison with those in special treaties. The requirement of equal treatment for tax claims such as is usually found in special

¹ These may be 'statements of arrears' (see Article 10 of the Treaty of 1938 between Germany and Italy, *I.T.A.*, vol. i, p. 403), or 'proof of indebtedness' (see Article 11 of the Treaty of 1940 between Germany and Yugoslavia, *ibid.*, p. 411).

² See Articles 12 and 13 of the Treaty of 1935 between Finland and Germany, *I.T.A.*, vol. i, p. 387; Articles 12 and 13 of the Treaty of 1940 between Germany and Yugoslavia, *ibid.*, p. 411; Articles 10 and 11 of the Treaty of 1938 between Italy and Roumania, *ibid.*, vol. ii, p. 214.

³ See Point 5 of the Final Protocol to the Treaty of 1937 between Germany and Roumania, *I.T.A.*, vol. i, p. 397; but note Articles 10 and 11 of the same Treaty, *ibid.*, p. 395.

⁴ See Point 4 of the Final Protocol of the Treaty of 1938 between Italy and Roumania, *I.T.A.*, vol. ii, p. 215, but note Articles 10 and 11 of the same Treaty, *ibid.*, p. 214.

⁵ See Point 8 of the Final Protocol of the Treaty of 1940 between Germany and Yugoslavia, *I.T.A.*, vol. i, p. 413, but note Articles 12 and 13 of the same Treaty, *ibid.*, p. 411.

⁶ See Point 7 of the Final Protocol of the Treaty of 1935 between Finland and Germany, *I.T.A.*, vol. i, p. 390; Article XV of the Treaty of 1949 between Norway and Sweden, *ibid.*, vol. ii, p. 224.

⁷ See Articles 6 and 7 of the Treaty of 1935 between Germany and Finland, *I.T.A.*, vol. i, p. 386; Articles 5 and 6 of the Treaty of 1938 between Italy and Roumania, *ibid.*, vol. ii, p. 213; Articles VIII and IX of the Treaty of 1943 between Finland and Sweden, *ibid.*, p. 220; Articles IX and X of the Treaty of 1949 between Norway and Sweden, *ibid.*, p. 223.

⁸ See *I.T.A.*, vol. i, pp. 420-30.

⁹ See the Exchange of Letters of 1945, *I.T.A.*, vol. i, pp. 426-7.

¹⁰ See Protocol, Annex 2, of the Treaty of 1945, *I.T.A.*, vol. i, p. 424.

agreements, is lacking.¹ Instead, the parties promise, on a basis of reciprocity, 'to lend assistance and support in the collection of taxes to which the present Convention relates, together with interest, costs and additions to the taxes and fines not being of a penal character',² the contracting State making such collection being responsible to the other for the sums thus collected. A restriction against assistance not provided for by the law of the applying State is sometimes included.³

As in the case of the special treaties on international administrative assistance, enforceability may be made conditional on a certain degree of finality of the proceedings in the applying State.⁴ Provision may be made for some sort of conservatory measure where a claim has not reached the requisite degree of finality.⁵ There may also be provisions for the service of

¹ For provisions in treaties on income and general property taxes see Article 6 of the Treaty of 1950 between France and Sweden, *I.T.A.*, vol. ii, p. 113; Article XVII of the Treaty of 1948 between Belgium and the United States, *ibid.*, p. 36; Article XIX of the Treaty of 1950 between Greece and the United States, *ibid.*, p. 83; Article XV of the Treaty of 1946 between the United States and the Union of South Africa, *ibid.*, vol. i, p. 163; Article XXII of the Treaty of 1948 between the Netherlands and the United States, *ibid.*, p. 245; Article XVIII of the Treaty of 1948 between Denmark and the United States, *ibid.*, p. 252.

For provisions in treaties on succession duties see Article 12 of the Treaty of 1946 between France and the United States, *ibid.*, vol. i, p. 371; Article VIII of the Treaty of 1947 between the Union of South Africa and the United States, *ibid.*, p. 380; Article IX of the Treaty of 1949 between Norway and the United States, *ibid.*, vol. ii, p. 197; Article IX of the Treaty of 1950 between Greece and the United States, *ibid.*, p. 204; Article 8 of the Treaty of 1936 between France and Sweden, *ibid.*, vol. i, p. 338.

² *Ibid.* There are variations in the wording, but the meaning remains substantially the same. Article XVII of the Treaty of 1948 between New Zealand and the United States, however, is far more restrictive. It provides as follows:

'Each of the contracting Governments may collect such tax imposed by the other contracting Government as will ensure that the exemption or reduced rate of tax granted under the present Convention by such other Government shall not be enjoyed by persons not entitled to such benefits.'

A number of treaties provide that the applications for enforcement 'may be accepted for enforcement by the other contracting State and collected in that State in accordance with the laws applicable to the enforcement and collection of its own taxes'. Sometimes 'may' is replaced by 'shall', but it is doubtful whether either of these expressions is as strong as the requirement of equal treatment. See Article XVII of the Treaty of 1948 between the United States and Belgium, *I.T.A.*, vol. ii, p. 36; Article XXI of the Treaty of 1950 between the Netherlands and Norway, *ibid.*, p. 125; Article XV of the Treaty of 1946 between the Union of South Africa and the United States, *ibid.*, vol. i, p. 163; Article XXII of the Treaty of 1948 between the United States and the Netherlands, *ibid.*, p. 245; Article XVIII of the Treaty of 1948 between the United States and Denmark, *ibid.*, p. 252. For provisions in treaties on succession duties see Article 12 of the Treaty of 1946 between France and the United States, *ibid.*, p. 371; Article VIII of the Treaty of 1947 between the Union of South Africa and the United States, *ibid.*, p. 380; Article IX of the Treaty of 1949 between Norway and the United States, *ibid.*, vol. ii, p. 197; Article IX of the Treaty of 1950 between Greece and the United States, *ibid.*, p. 204.

³ For provisions in treaties on income and general property taxes see Article XVII of the Treaty of 1948 between Belgium and the United States, *I.T.A.*, vol. ii, p. 36; Article XXI of the Treaty of 1950 between the Netherlands and Norway, *ibid.*, p. 125; Article XVII of the Treaty of 1939 between Sweden and the United States, *ibid.*, vol. i, p. 85; Article XXII of the Treaty of 1948 between the United States and the Netherlands, *ibid.*, p. 245.

For provisions in treaties on succession duties see Article IX of the Treaty of 1950 between Greece and the United States, *ibid.*, vol. ii, p. 204.

⁴ See *supra*, n. 1.

⁵ See *supra*, n. 1.

documents and the prohibition of preference for fiscal claims in the enforcing State, although the provision in the special treaties for a variation in the procedure of the enforcing State on the request of the applying State is not usually included.¹

(c) *Exchange of information*

By far the most common provision in the tax treaties for international co-operation in the enforcement of fiscal laws is that for the exchange of information between the tax systems of the two parties to the treaty. Some States prefer to rely exclusively upon this method, especially the United Kingdom. Other States use it in conjunction with the procedures for collection which have been discussed above.

1. *Special treaties.* An examination of special treaties on administrative assistance reveals that they usually do not contain a specific provision for the exchange of information, but it is clear that such an exchange is contemplated. Consequently, the furnishing of information for the enforcement of fiscal laws must be understood as included within the scope of the broad provision for administrative assistance which is found in these treaties.² In some cases a specific provision on the exchange of information does exist to state the procedure by which the information should be exchanged,³ or the precise nature of the information required.⁴ It is usually provided that there should be direct communication between the fiscal authorities of the two States⁵ and, as in the case of assistance in collection, that requests should be answered without delay, informing the applicant of the manner in which the request will be granted if it is granted, or of the reasons for refusal if it is refused.⁶

Limitations are imposed upon the transmission of information where the applying State is unable under its own laws to obtain similar information, where the information has been obtained through an obligation to furnish it which does not exist in the applying State, or where there may be a

¹ See *supra*, p. 471, n. 1.

² See *supra*, p. 468, n. 7.

³ See Article X of the Treaty of 1943 between Finland and Sweden, *I.T.A.*, vol. ii, p. 220; and Point 3 of the Final Protocol to the same Treaty, *ibid.*, p. 221.

⁴ See Article XII of the Treaty of 1949 between Norway and Sweden, *I.T.A.*, vol. ii, p. 223.

⁵ See Article 4 of the Treaty of 1935 between Germany and Finland, *I.T.A.*, vol. i, p. 386; Article 3 of the Treaty of 1937 between Germany and Roumania, *ibid.*, p. 394; Article IV of the Treaty of 1943 between Finland and Sweden, *ibid.*, vol. ii, p. 219; Article IV of the Treaty of 1949 between Norway and Sweden, *ibid.*, p. 222.

⁶ See Article 15 of the Treaty of 1935 between Finland and Germany, *I.T.A.*, vol. i, p. 388; Article VII of the Treaty of 1943 between Finland and Sweden, *ibid.*, vol. ii, p. 219; Article VII of the Treaty of 1949 between Norway and Sweden, *ibid.*, p. 222.

Provision is normally also made for the language to be used. See Article 5 of the Treaty of 1935 between Finland and Germany, *ibid.*, vol. i, p. 386; Article V of the Treaty of 1949 between Norway and Sweden, *ibid.*, vol. ii, p. 222.

violation of commercial, business, industrial, or official secrecy.¹ The transmission of documents is permitted only in exceptional cases.²

2. *General treaties.* The general treaties on the avoidance of double taxation and fiscal evasion usually contain a provision, however brief, for the exchange of information necessary to ensure the execution of the convention,³ sometimes specifying, in addition, certain classes of information to be exchanged on a regular basis.⁴ The treaties usually provide also for direct communication between the tax authorities of the contracting Governments,⁵ although it is sometimes stipulated that communication of a particular sort, such as information concerning particular individuals or corporations whose taxability is in question, must be obtained through diplomatic channels.⁶ The information transmitted must not be disclosed to any persons other than those concerned with the assessment and collection of the taxes, and no information will be exchanged which would disclose any trade secrets or process.⁷

¹ See Articles 14 and 16 of the Treaty of 1935 between Finland and Germany, *I.T.A.*, vol. i, p. 388; Articles X and XIII of the Treaty of 1943 between Finland and Sweden, *ibid.*, vol. ii, p. 220; Articles XI and XVII of the Treaty of 1949 between Norway and Sweden, *ibid.*, p. 224.

² See, for example, Point 2 of the Final Protocol to the Treaty of 1943 between Finland and Sweden, *I.T.A.*, vol. ii, p. 221.

³ For provisions of treaties on income and general property taxes see Article XIX of the Treaty of 1942 between Canada and the United States, *I.T.A.*, vol. i, p. 108; Article XX of the Treaty of 1945 between the United Kingdom and the United States, *ibid.*, p. 124; Article XXI of the Treaty of 1948 between the United States and the Netherlands, *ibid.*, p. 245; Article XVII of the Treaty of 1948 between the United States and Denmark, *ibid.*, p. 252; Article XVI of the Treaty of 1948 between the Netherlands and the United Kingdom, *ibid.*, vol. ii, p. 26; Articles XV and XVI of the Treaty of 1948 between Belgium and the United States, *ibid.*, p. 35; Article XXI of the Treaty of 1950 between France and the United Kingdom, *ibid.*, p. 120; Article XVIII of the Treaty of 1950 between Denmark and the United Kingdom, *ibid.*, p. 93; Article XX of the Treaty of 1949 between Sweden and the United Kingdom, *ibid.*, p. 53; Article XV of the Treaty of 1949 between Norway and the United States, *ibid.*, p. 57; Article XXII of the Treaty of 1949 between France and the Netherlands, *ibid.*, p. 75; Article 14 of the Exchange of Notes of 1950 between Israel and the United Kingdom, *ibid.*, p. 80.

For the provisions of treaties on succession duties see Article VII of the Treaty of 1949 between Norway and the United States, *ibid.*, p. 197; Article VIII of the Treaty of 1950 between Greece and the United States, *ibid.*, p. 204; Article VII of the Treaty of 1945 between the United Kingdom and the United States, *ibid.*, vol. i, p. 353; Article 8 of the Treaty of 1946 between France and the United States, *ibid.*, p. 369; Article VII of the Treaty of 1947 between the Union of South Africa and the United States, *ibid.*, p. 380.

Provisions on the exchange of information may also be found in treaties on the taxation of commercial and industrial enterprises (see Article VIII of the Treaty of 1949 between Ireland and the United Kingdom in *ibid.*, vol. ii, p. 151) and on extraordinary capital levies (see Article VIII of the Treaty of 1949 between France and the Netherlands, *ibid.*, p. 133).

⁴ For provisions of treaties on income and general property taxes see Articles XX and XXI of the Treaty of 1942 between the United States and Canada, *I.T.A.*, vol. i, p. 108; Article XVI of the Treaty of 1949 between Norway and the United States, *ibid.*, vol. ii, p. 57.

For provisions of treaties on succession duties see Article VIII of the Treaty of 1949 between Norway and the United States, *ibid.*, p. 197; Articles 9 and 10 of the Treaty of 1946 between France and the United States, *ibid.*, vol. i, p. 369.

⁵ See *supra*, n. 3.

⁶ See Article XVIII of the Treaty of 1939 between Sweden and the United States, *I.T.A.*, vol. i, p. 85.

⁷ See *supra*, n. 3. See also Article XVIII of the Treaty of 1949 between Norway and the

IV. *Conclusion*

The enforcement of taxation under international law has two main aspects: the forms of redress available to aliens against the enforcement of taxation by the taxing State, and the forms of aid available to the taxing State from other States against recalcitrant taxpayers. An alien may protect his rights under international law against the taxing State through the judicial offices of the taxing State, through the diplomatic offices of his home State, and, where arrangements have been made therefor, through international adjudication, arbitration and agreement. The taxing State may enlist the aid of other States to enforce its tax laws against taxpayers or their property outside its jurisdiction under private international law or under treaty law where the latter is applicable. The customary rule of private international law against enforcement of the revenue laws of foreign States is largely the result of the misapplication of a questionable *dictum*. It is productive of tax evasion and is no more justified in policy than in law. It is to be hoped that the already marked trend in the direction of a departure from this rule will continue. Meanwhile, international co-operation in the enforcement of taxation is steadily growing through treaties on extradition, collaboration in collection, and exchange of information.

United States, *I.T.A.*, vol. ii, p. 58; Point 11 of the Protocol to the Treaty of 1939 between Sweden and the United States, *ibid.*, vol. i, p. 88; Point VII of the Protocol to the Treaty of 1939 between France and the United States, *ibid.*, p. 97.

NOTES

THE ASSIGNABILITY OF TREATY RIGHTS

It is, of course, clear that there are many treaties in connexion with which it would be unthinkable to treat rights arising from them as assignable. Rights to political or armed support, rights to the extradition of criminals, rights to the recognition or enforcement of judgments—these are a few examples of cases in which obviously there cannot be any question of an assignment. Yet it is to be noted that contracting States have on occasions thought it necessary to make express provision about assignments. By the Agreement made on 27 March 1941 between the United Kingdom and the United States of America and relating to the Leased Areas in Newfoundland and the West Indies, the United States of America was given comprehensive rights of user and jurisdiction in the Leased Areas.¹ Article XXIII of the Agreement provides that 'the United States will not assign or underlet or part with the possession of the whole or any part of any Leased Area or of any right, power or authority granted by the Leases or this Agreement.' An Agreement made between the same two States on 21 July 1950² confers upon the United States similar rights in the Bahamas Islands for the purpose of establishing and maintaining a long-range proving ground for guided missiles. According to Article XX 'the Government of the United States of America shall not assign or part with any of the rights granted by this Agreement'. On 26 November 1951 the Governments of the United States of America and the United Kingdom entered into a similar Agreement with the Dominican Republic;³ this, however, does not contain a covenant against assignments. In a different field the picture to be derived from the practice of States is equally varied. Treaties of a financial character have long been known to include frequently clauses permitting the assignment of the debt. Thus, when the inter-allied debts came to be settled after the First World War, the bonds issued by their debtor states to the United States of America and the United Kingdom respectively embodied the promise to pay certain sums to the creditor State 'or order'.⁴ By virtue of the policy of economic co-operation the Government of the United States of America caused several lines of credit to be established in favour of the United Kingdom. Thus the Loan Agreements which the United Kingdom concluded with the Export-Import Bank of Washington provided for the execution by the borrower of promissory notes containing the promise to pay 'to Export-Import Bank of Washington, an Agency of the United States of America, its successors or assigns'.⁵ By an Agreement of 7 September 1949 Belgium opened in favour of the United Kingdom a credit in Belgian francs equivalent to \$28m. for the purpose of financing the deficit of the sterling area with the Belgian monetary area.⁶ The promissory note executed by the United Kingdom provides for repayment to the Belgian Government, but by Article 6 of the Agreement the latter 'undertakes not to assign, pledge or mortgage any promissory note given by the Government of the United Kingdom . . . except in favour of one or more Belgian Government Agencies or Institutions. In the event of such assignment,

¹ Cmd. 6529.

² Cmd. 8109.

³ Cmd. 8546.

⁴ For references see this *Year Book*, 21 (1944), pp. 28, 29 and 30.

The Agreements are conveniently collected in Cmd. 8126 which, in effect, supersedes Cmdd. 7550, 7636 and 8053. It is, of course, arguable that these Agreements and promissory notes are not subject to public international law at all. But this problem (on which see the paper referred to in the preceding footnote) is outside the scope of the present observations.

⁵ Cmd. 8365, which supersedes Cmd. 7811.

pledge or mortgage the Belgian Government shall notify the Government of the United Kingdom within thirty days.' However, no corresponding term is included in the Agreement of 30 June 1952 between the United Kingdom and Belgium whereby the former acknowledged to be indebted to the latter in the sum of 1,250m. Belgian francs and undertook to discharge the debt by the supply of defence equipment or, in certain events, by payment. Nor is anything said about assignment in the Agreements covering the loans made by the United Kingdom and France to Poland on 7 September 1939,¹ by the United Kingdom to Turkey on 27 May 1938² or to Spain on 18 March 1940,³ or by the United Kingdom and other members of the Commonwealth to Burma on 28 June 1950.^{4, 5}

In these circumstances it is apparent that assignments are sometimes expressly permitted, sometimes expressly precluded. Neither of these courses adopted by contracting Governments is of assistance in dealing with treaties which are silent on the question of assignability. According to established principles the existence of particular stipulations in a treaty, e.g. for or against assignments, does not mean that in general, that is, in the absence of such stipulations, the reverse would be true.⁶ Nevertheless, the differences in State practice do show, first, that a problem exists which draftsmen have solved sometimes in the one, sometimes in the other sense; secondly, that the assignability of treaty rights is by no means a conception which would be necessarily and *a priori* alien to and inconsistent with international law; and thirdly, that a rule of customary international law must be found so that it may apply where draftsmen fail to make specific provision.

The problem is *primae impressionis*, and its solution would not be facilitated if reference were made to the much-discussed fate of treaties in case of State succession, —a question to which Dr. Jenks has recently made a weighty contribution.⁷ The succession to treaties, i.e. to contractual arrangements involving both rights and duties, is as different from the assignability of treaty rights as is in private law the succession to contracts from the assignability of debts or choses in action.

The fundamental argument which is likely to be levelled against the assignability of treaty rights is derived from the fact that every treaty is founded upon a background of relationships between the contracting States which is of a political and, consequently, of a personal character, and that, therefore, in the absence of express provisions, the promisor State cannot be expected to allow an assignee, whether it be a State or a private person, to intrude upon an obligation which is indicative of peculiar and delicate ties. This line of reasoning, it is true, is so obvious and so forceful that it requires neither illustration nor amplification. Yet it proves too much. Indeed, it is of a rigidity which is typical for a legal system that still finds itself in an early and primitive stage of development. For centuries the same reasoning used to hold the private law of all nations in thrall. Thus, before Justinian, Roman law did not permit the assignment of debts,⁸ and the common law was no less slow in developing the assignability of choses in action.⁹ Both legal systems were unable to overcome the conceptualist difficulty of

¹ Cmd. 6110.

² Cmd. 6119.

³ Cmd. 6230.

⁴ Cmd. 8007.

⁵ The credits granted by the United Kingdom to Yugoslavia in pursuance of the Agreements of 28 December 1950 and 11 January 1951 (Cmd. 8149 and Cmd. 8172) are secured by promissory notes issued by Yugoslavia and made payable to bearer.

⁶ See McNair, *The Law of Treaties* (1938), p. 255.

⁷ See this *Year Book*, 29 (1952), pp. 105–44.

⁸ See Buckland, *Roman Law* (2nd ed., 1950), p. 407; Kunkel, *Römisches Privatrecht* (1949), p. 205.

⁹ See, for example, Pollock, *Principles of Contract* (13th ed. by Winfield, 1950), p. 570; Holdsworth in *Harvard Law Review*, 33 (1919–20), pp. 1018 ff.; S. J. Bailey in *Law Quarterly Review*, 47 (1931), p. 516, and *ibid.* 48 (1932), pp. 248, 547.

the *vinculum juris*, of the strictly personal nature of the obligation which, so it was thought, precluded a change in the identity of the creditor. It was only in modern times that it became possible to devise a flexible solution, based on the interests of the three persons concerned rather than on a preconceived dogma. In broad terms it may be stated that the assignment of debts and other choses in action is nowadays permitted everywhere save, in the words of the Swiss Civil Code,¹ if and in so far as the agreement or the specific character of the obligation demands otherwise. This is a rule which, by and large, is probably common to all modern systems of private law and which may be regarded as a general principle of law.

It is submitted that the formula should yield satisfactory results in public international law, though non-assignability which in private law is the exception will in fact be the rule in public international law. It will in each case be necessary to weigh the circumstances prevailing at the time of the conclusion of the treaty, the interests of both parties, the terms of the treaty itself, the significance of the identity of the assignee, and the effect of an assignment upon the *debitor cessus*—the paramount rule being that his position is not to be prejudiced as a result of the assignment. Since the matter depends, therefore, on factual rather than legal considerations it is not easy to give examples of cases in which the assignment of a treaty right is clearly permissible. It cannot even be asserted that purely financial claims (such as claims to the repayment of loans) are necessarily assignable or are assignable to anyone. In view of the modern mechanics of international trade and finance and, in particular, the implications of exchange control, it may be, for instance, that the assignment of such a claim to another Government is excluded, but its assignment to a national of the assignor State is unobjectionable. But these are details. They do not affect the principle that rights arising from treaties are capable of being assigned.

Such an assignment occurred, and was not challenged, in the case of *Bank voor Handel en Scheepvaart v. Slatford*²—a decision which in more than one respect contains some important observations on the effect of treaties in English law, though they are not made readily apparent by the very concise judgment delivered by Devlin J. The plaintiffs, a Dutch Bank, were the owners of gold bars and certain bank balances in England. As a result of a vesting order made by the Board of Trade in July 1940 the gold bars were sold by the Custodian of Enemy Property who, in May 1950, transferred the proceeds to the second defendant, the Administrator of Hungarian Property, on the ground that all the shares in the plaintiff Company were owned by a Hungarian national and that, therefore, the plaintiff Company's own assets were subject to the charge which the Treaty of Peace with Hungary imposed upon the property of Hungarian nationals. The plaintiffs' objection to this transfer rested on two propositions. They said that at the material time, i.e. in September 1947, the proceeds of sale were payable to the State of the Netherlands which in 1950 had assigned them to the plaintiffs, and thus did not constitute Hungarian property. They also said that the assets of a Dutch limited company were not the property of its shareholders. The plaintiffs succeeded on the latter ground, and it was for this reason that the learned Judge did not feel called upon to say much about the former. For the academic lawyer, however, it does remain of some interest.

The plaintiffs' argument was derived from the Anglo-Dutch Property Agreement of 2 October 1944, which has never been published but is very similar to the Anglo-Belgian Property Agreement of 6 October 1944.³ The Agreement, in short, provided for the release to the Dutch Government of property situate in the United Kingdom

¹ Article 183.

³ Cmd. 6665.

² [1953] 1 Q.B. 248.

which fell within the definition of enemy property in the Trading with the Enemy Act, 1939, but belonged to Dutch nationals. By a document in writing of which notice was given to the Board of Trade the Dutch Government assigned to the plaintiffs its right to the payment of the proceeds of sale, which arose under the Treaty of October 1944. This, it is submitted, was a legitimate assignment and, as mentioned above, its legality was not challenged by the Solicitor-General. It is, of course, another matter that the learned Judge refused to allow the plaintiffs to recover by virtue of the Treaty on the ground that this was held to be not 'justiciable' and incapable of 'legal interpretation'.¹

It would be contrary to the main submission made in this Note if an attempt were made to classify the types of treaties in which an assignment of rights may or may not be possible. The only test of a general character which may perhaps be suggested and which in some cases may assist in solving the problem of construction and may have been applicable to the case decided by Devlin J., is the following: where a provision in a treaty appears to be made for the benefit of third persons,² an assignment of treaty rights to such third persons may be more readily sanctioned than an assignment in cases in which the contracting States do not contemplate a third party as a beneficiary.

F. A. MANN

LEGAL ASPECTS OF THE CONVENTION OF 25 JULY 1951 RELATING TO THE STATUS OF REFUGEES

ON 21 January 1954 the Government of the Commonwealth of Australia acceded to the Convention relating to the Status of Refugees, which was adopted at Geneva on 25 July 1951, as the sixth State ratifying or acceding to the Convention. It had previously been ratified by Belgium, Denmark, the German Federal Republic, Luxembourg and Norway. In accordance with Article 43, the Convention entered into force on the ninetieth day following the day of deposit of the sixth instrument of ratification or accession. The Government of the United Kingdom ratified the Convention on 11 March 1954. The Convention is not only an important event for the international legal protection of refugees and the definition of their status. It also throws interesting light on some questions of international law, especially with regard to the position of the individual; and analysis of its provisions—from this point of view—seems to be indicated.³

I. *Persons covered by the Convention*

It is convenient to compare the provisions of the Convention on the subject with those of the Constitution of the—now liquidated—International Refugee Organization (Annex I of that Constitution). It was for the Organization itself to determine the persons who came within the scope of its activities. Such determination, for which the term 'eligibility determination' has become accepted, was made for the internal purposes of the Organization, and did not directly affect the position of the persons concerned in municipal or international law. However, under specific arrangements and agreements made by the Organization with individual countries or under municipal laws and regulations, the determination of a person as a refugee within the mandate of the Organization became relevant for purposes of municipal and international law. For

¹ At p. 254.

² See Oppenheim, *International Law*, vol. i (7th ed. by Lauterpacht, 1948), pp. 829 ff.

³ For a survey of the developments in this sphere prior to the adoption of the Convention of 1951 see the article by the present writer in *American Journal of International Law*, 48 (1954), pp. 193–221.

instance, in France, a certificate of eligibility issued by the Delegate of the International Refugee Organization in France was required of a refugee in order for him to obtain a residence or work permit or to enjoy the rights and benefits accorded to refugees under French law and under international agreements to which France was a party. The applicability of certain enactments, such as, for instance, Law No. 23 of the Allied High Commission for Germany¹ which regulates the personal status of refugees and the validation of religious marriages contracted by refugees, is dependent on certification of refugee status by the international organization entrusted by the United Nations with the protection of refugees. The importance attached to the definition of 'refugee' is evident from the fact that it was provided in the Constitution of the International Refugee Organization that:²

'To ensure the impartial and equitable application of the above principles and of the terms of the definition which follows, some special system of semi-judicial machinery should be created, with appropriate constitution, procedure and terms of reference'.

In accordance with this provision of the Constitution, a Review Board for eligibility appeals was established by the General Council of the International Refugee Organization. The members of the Board were appointed by the Director-General of the International Refugee Organization, subject to the approval of the Executive Committee. The Chairman had to be chosen from among experienced jurists who had held high judicial office in their own countries and who were conversant with the English and French languages.

Article 1 of the Convention of 1951 contains a definition of refugees to whom the Convention shall apply. It first stipulates that the Convention

'shall apply to any person who:

'has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization.'

It thus consecrates the concept of so-called 'statutory refugees', i.e. refugees who are covered by international agreements. Article 1 then defines as a refugee for the purposes of the Convention

'any person who:

'As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'

The limitation which results from the stipulation 'as a result of events occurring before 1 January 1951' was incorporated in the Convention because it was felt that 'it would be difficult for Governments to sign a blank cheque and to undertake obligations towards future refugees, the origin and number of which would be unknown'.³

Article 1 then proceeds to impose on the Contracting States an obligation to make at the time of signature, ratification or accession, a declaration whether the words 'events occurring before 1 January 1951' shall be understood to mean 'events occurring in Europe before 1 January 1951', or 'events occurring in Europe or elsewhere before

¹ See *Journal of the Allied High Commission for Germany*, No. 13 of 25 March 1950.

² Paragraph 2 of Annex I.

³ See *Report of the First Session of the Ad Hoc Committee on Stateless Persons and Related Problems* (U.N. Doc. E/1618), p. 38.

1 January 1951'. It thus allows for a further optional restriction of the personal scope of the Convention by individual Contracting States. The Article contains an enumeration of conditions under which a person shall cease to be considered a refugee (e.g. 'if he has acquired a new nationality and enjoys the protection of the country of his new nationality') and provisions excluding certain persons from the benefits of the Convention (e.g. 'any person in respect of whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity as defined in the international instruments drawn up to make provision in respect of such crimes').

The definition contained in the Convention comes very near to the definition of refugees adopted by the Institute of International Law at its 40th Session in Brussels in 1936. Article 2, paragraphs 2 and 3, of its Resolution on the Legal Status of Stateless Persons and Refugees reads:

'2. Dans les présentes résolutions, le term "réfugié" désigne tout individu qui, en raison d'événements politiques survenus sur le territoire de l'Etat dont il était ressortissant, a quitté volontairement ou non ce territoire ou en demeure éloigné, qui n'a acquis aucune nationalité nouvelle et ne jouit de la protection diplomatique d'aucun autre Etat.

'3. Les qualités d'apatride et de réfugié ne s'excluent pas.'

Thus two conditions are essential for the quality of refugee: residence outside the country of nationality or former nationality and lack of diplomatic protection by any State. So long as a person is deprived of diplomatic protection, it is immaterial for his quality as a refugee whether he is stateless or still formally holds the nationality of the country from which he fled. Refugees may therefore be stateless persons or not. It has become usual to speak of refugees who still retain the nationality of their country of origin as '*de facto* stateless persons', as distinct from '*de jure* stateless persons'. This terminology is probably inexact.¹ For statelessness is a purely legal concept; it connotes lack of nationality. Refugees are deprived of diplomatic protection by a State—which is a function of nationality—but they do not necessarily lack nationality; they are unprotected persons who may be stateless or not. It is more appropriate to speak of *unprotected persons*, who, again, may be subdivided into *de jure* unprotected persons, i.e. stateless persons, and *de facto* unprotected persons, i.e. refugees; it being understood that there are also refugees who are *de jure* unprotected, i.e. stateless. After the First World War the Soviet Union resorted to a policy of mass denationalization of refugees,² and Nazi Germany enacted legislation for the global denationalization of Jews resident abroad. Immediately after the Second World War some countries of eastern Europe deprived persons of German race (in Czechoslovakia also of Hungarian race) of their nationality by operation of law. Since then, measures of mass denationalization have decreased, and the great majority of the refugees to whom the Convention applies are not stateless. From the legal point of view the most important feature of the definition contained in the Convention is that it does not base the concept of refugee on the criterion of nationality and that its provisions apply, therefore, equally to stateless and to *de facto* unprotected refugees.

The determination whether an individual is a refugee in the sense of Article 1 of the Convention and whether, therefore, the Convention is to be applied to him is clearly within the competence of the Contracting States. The definition of refugee in the Convention is similar to that contained in the Statute of the United Nations High Commissioner for Refugees,³ with the difference that the Statute does not contain the

¹ See this *Year Book*, 27 (1950), p. 510.

² See Sir John Fischer Williams, 'Denationalization', in this *Year Book*, 8 (1927), pp. 45-61.

³ See Resolution 428A (V) of the General Assembly of the United Nations of 14 December 1950.

time limit for the purposes of refugee status laid down in the Convention and that the competence of the High Commissioner extends, therefore, to future refugees. Determination of refugee status for the purpose of the application of the Statute is the function of the United Nations High Commissioner for Refugees. It is obviously desirable that these interpretations of the refugee concept should as far as possible be uniform. This result is achieved by co-operation between the United Nations High Commissioner for Refugees and the competent national authorities in the determination of refugee status according to procedures which vary in individual countries. Thus in Belgium the status of refugee is determined, both for the purpose of Belgian law and the application of the Convention, by the Representative of the United Nations High Commissioner for Refugees in Belgium under an arrangement with the Belgian Government. In France this task has, under a special Law of 25 July 1952, been assumed by a newly-created French Office for the Protection of Refugees and Stateless Persons. Persons who are not recognized as refugees by the Office may appeal to an Appeal Commission consisting of three members, one of whom is the Representative of the United Nations High Commissioner for Refugees in France. In Italy, refugee status for the purpose of Italian law is determined, under an arrangement between the Office of the United Nations High Commissioner for Refugees and the Italian Government, by a Joint Committee consisting of representatives of the Italian Government and of the United Nations High Commissioner for Refugees.

II. *The question of the right of asylum*

According to general international law as at present constituted, the so-called right of asylum is a right of States, not of the individual.¹ A clause on the right of asylum has been incorporated in the Universal Declaration of Human Rights² in a form which has been rightly criticized as being somewhat nominal and not borne out by existing international law.³ The draft Conventions relating to the status of refugees presented by France and by the Secretariat of the United Nations to the *Ad Hoc* Committee on Stateless Persons and Related Problems at its first session contained an Article dealing with the admission of refugees. The provision in the text submitted by the Secretariat, which was accepted by the Committee as the basis for its discussions, read:

'1. In pursuance of Article 14 of the Universal Declaration of Human Rights the High Contracting Parties shall give favourable consideration to the position of refugees seeking asylum from persecution or the threat of persecution on account of their race, religion, nationality or political opinions.

'2. The High Contracting Parties shall to the fullest possible extent relieve the burden assumed by initial reception countries which have afforded asylum to persons to whom paragraph 1 refers. They shall do so, *inter alia*, by agreeing to receive a certain number of refugees in their territory.'⁴

The Committee decided not to include a clause on admission in the operative part of the Convention. The Final Act of the Conference of Plenipotentiaries which adopted the Convention of 1951 contains a recommendation in the following terms:

'that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement'.⁵

¹ See Morgenstern in this *Year Book*, 26 (1949), pp. 327-57.

² Article 14, paragraph 1: 'Everyone has the right to seek and to enjoy in other countries asylum from persecution.'

³ See Lauterpacht, 'The Universal Declaration of Human Rights', in this *Year Book*, 25 (1948), pp. 351-81, at p. 383; the same, *International Law and Human Rights* (1950), p. 422.

⁴ U.N. Doc. E/AC.32/2, p. 22.

⁵ U.N. Doc. A/CONF.2/108, p. 9.

Article 31 of the Convention has a bearing on the subject:

'The Contracting States shall not impose penalties on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.'

In connexion with the question of expulsion of refugees the Convention provides, in Article 32, that a refugee lawfully in the territory of a Contracting State 'shall not be expelled save on grounds of national security or public order'. Such a refugee shall be expelled 'only in pursuance of a decision reached in accordance with the due process of law. Except where compelling reasons of national security require otherwise, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before the competent authority or a person or persons specially designated by the competent authority'.

Article 33, which must be considered as one of the fundamental provisions, reads:

'No Contracting State shall expel or return [*refouler*] a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

The obligation is qualified in the sense that the benefits of this provision may not be claimed by a refugee 'whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'. While the principle contained in this provision was accepted by all the delegates at the Conference of Plenipotentiaries, the question of its implications gave rise to considerable discussion. The Swiss delegate considered that the word 'return' (*refouler*) applied solely to refugees who had already entered the country but were not yet resident there. According to that interpretation States were not obliged to allow large groups of persons claiming refugee status to cross their frontiers.¹ Several delegates agreed with the interpretation given by the Swiss delegate. At the second reading the Netherlands representative recalled that at the first reading the Swiss representative had expressed the opinion that the word 'expulsion' related to a refugee already admitted into a country, whereas the word 'return' (*refoulement*) related to a refugee already within the territory but not yet resident there. According to that interpretation the Article would not have involved any obligations in the possible case of mass migration across frontiers or attempted mass migration. It was ruled by the President that the interpretation given by the Netherlands representative should be placed on record.²

Articles 32 and 33 constitute a limitation of the right to expel aliens, a right which—unless exercised arbitrarily—is considered as an incident of territorial supremacy. Article 33 simply codifies, however, what is the practice of civilized States. Provisions against forcible return of refugees to a country of persecution may be found in many international instruments. They were contained, in an even more precise form, in the international instruments relating to the status of refugees adopted prior to the Second World War. The Convention concerning Migration for Employment (Revised 1949), adopted by the International Labour Conference at its 32nd session on 1 July 1949, contains a limited restriction of the right of expulsion.³ The Model Agreement on

¹ *Summary Records of the Conference* (U.N. Doc. A/CONF.2/SR.16), p. 6.

² *Ibid.* (U.N. Doc. A/CONF.2/SR.25), p. 21.

³ I.L.O. Convention 97, Article 8.

Temporary and Permanent Migration for Employment, including Migration of Refugees and Displaced Persons, adopted by the same Conference, contains a prohibition of the compulsory return of refugees to their countries of origin.¹

Taken in their entirety, these instruments reflect what at the present stage of development of international law may not yet be a customary rule, but which has acquired the complexion of a usage, i.e. that refugees shall not be returned to a country where their life or freedom would be in danger on the ground of their political opinion. This leads the way to the adoption of the principle that a State shall not refuse admission to a refugee, i.e. that it shall grant him at least temporary asylum—pending his settlement in a country willing to grant him residence—if non-admission is tantamount to surrender to the country of persecution.

III. *Rights of refugees in the country of residence*

(a) *Treatment in general.* The Convention provides that, where it does not contain more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally (Article 7). Nothing in the Convention shall be deemed to impair any rights and benefits accorded by a Contracting State apart from the Convention (Article 5). The granting to refugees of the treatment accorded to aliens in general is not always a self-evident principle. Laws are drafted with the conception of the normal alien, the protected alien, in the mind of the legislator, and the granting of rights to refugees is sometimes, according to municipal law, conditional upon requirements, such as the possession of a national passport, &c., which refugees cannot fulfil. In this connexion an interesting interpreting clause in the Convention provides that the term 'in the same circumstances', when used in the Convention, 'implies that any requirements which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, *with the exception of requirements which by their nature a refugee is incapable of fulfilling*' (Article 6).²

(b) *Quasi-consular functions.* In order to overcome the legal difficulties arising for refugees from the lack of assistance of diplomatic or consular representatives, the Convention contains provisions relating to administrative assistance. It is provided in Article 25 that 'when the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States shall arrange that such assistance be afforded to him by their own authorities or by an international authority'. These authorities 'shall deliver or cause to be delivered under their supervision to refugees such documents or certificates as would normally be delivered to aliens by or through their national authorities'.

The question of these so-called quasi-consular functions played a considerable role in the efforts made in the past for the international protection of refugees. The importance for aliens of possessing documents issued by the authorities of their country of nationality varies from country to country, according to the legal system of the country concerned. It is of lesser importance in countries such as the United Kingdom, where such documents often can be replaced by sworn statements. An arrangement of 30 June 1928³ recommended that these quasi-consular functions should be discharged by the representatives of the League of Nations High Commissioner for Refugees. As this constituted only a recommendation, an Agreement⁴ was concluded on the same date, to which Belgium and France became parties, in which these functions were entrusted

¹ I.L.O. Recommendation No. 86, Article 25, paragraph 2.

² Italics are the author's.

³ See *League of Nations Treaty Series*, vol. 89, No. 2005.

⁴ Agreement concerning the Functions of the Representatives of the League of Nations High Commissioner for Refugees (see *League of Nations Treaty Series*, vol. 93, No. 2126).

to the League of Nations High Commissioner's Representatives in those countries. This function was later taken over in France by the International Refugee Organization under a special Agreement with the French Government.¹ Subsequently, under the Law of 25 July 1952, it was taken over by the French Office for the Protection of Refugees and Stateless Persons. The Convention has adopted a compromise formula, leaving it to the Contracting States to decide whether they wish to entrust this function to their national authorities or to an international authority, i.e. the agency charged with the international protection of refugees.

(c) *Exemption from reciprocity.* The importance of the principle of reciprocity for the treatment of aliens varies from country to country according to their municipal law. In the United Kingdom, instances in which the granting of rights to aliens is made subject to reciprocal treatment are rare. The principle is of far greater importance in countries which base their civil law on the Napoleonic Code, according to which the granting of civil rights to aliens is, in principle, subject to diplomatic or treaty reciprocity. The laws of various countries subject the treatment of aliens as regards particular rights to so-called legislative or *de facto* reciprocity, i.e. to the granting of similar treatment to their nationals in the country of nationality of the alien. In realization of the fact that this principle serves no purpose in the case of refugees, the Conventions concerning the Status of Refugees of 1933 and 1938 exempted refugees covered by these agreements from the application of the principle of reciprocity. The Convention of 1951 provides for a limited exemption only from the application of this principle. Refugees shall, after three years' residence in the country, be exempt from legislative reciprocity and they shall continue to enjoy the rights and benefits to which they were entitled in the absence of reciprocity at the date of the entry into force of the Convention—a provision which maintains for statutory refugees the more favourable status accorded to them under the pre-war Conventions. The Convention further contains a recommendation to grant to refugees more far-reaching exemptions from reciprocity (Article 7, paragraphs 2-4).

(d) *Exemption from exceptional measures.* An interesting provision is contained in Article 8, according to which exceptional measures taken against the person, property or interests of nationals of a foreign State shall not be applied to a refugee who is formally a national of that State, solely on account of his nationality. The provision constitutes an extension of the principle embodied in Article 44 of the Geneva Convention of 12 August 1949 concerning the Protection of Civilian Persons in Time of War. That Article reads:

'In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any Government.'

(e) *Personal status.* The provisions of the Convention of 1951 concerning personal status are of particular importance. The personal status of refugees is to be governed by the law of the country of their domicile or, if they have no domicile, by the law of their country of residence. Rights previously acquired by a refugee and dependent on personal status are, however, to be respected on certain conditions (Article 12). The Convention does not define the term 'domicil', nor can such a definition be found in

¹ Agreement between the French Government and the International Refugee Organization Preparatory Commission concerning the Protection of Refugees and Displaced Persons coming within the Mandate of the International Refugee Organization and the Quasi-consular Functions of the Representative in France of the International Refugee Organization Preparatory Commission, 15 January 1948 (I.R.O. Doc. PC/LEG/11).

the *travaux préparatoires*. The very phrasing of Article 12 ('... shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence'), would seem, however, to imply that domicile in the sense of the common law can hardly have been intended. Not only the principle of nationality which governs the private international law of most countries of Europe and of certain Latin-American countries, but also the principle of domicile in the rigid conception of this term in common law—which leads to retention of the domicile of birth in the absence of a clearly established domicile of choice and to a revival of the domicile of birth in case of abandonment of the domicile of choice—may lead to hardship in the case of refugees. It seems reasonable to base the personal status of refugees on the law of their country of habitual residence. This provision of the Convention gains added importance in the light of the recent tendencies to replace the common law concept of domicile by a less rigid definition which would avoid the retention or revival of the domicile of birth where this no longer corresponds to the circumstances and the intentions of the individual concerned, as is the case with refugees.¹

(f) *Specific rights*. While the Convention stipulates for refugees in general the treatment accorded to aliens generally, this principle does not apply for refugees with regard to a wide range of specific rights, in respect of which refugees are to enjoy more favourable treatment. Four standards of treatment are established:

- (1) national treatment, i.e. the treatment accorded to nationals of the Contracting State concerned;
- (2) the treatment accorded to nationals of the country of habitual residence;
- (3) most-favoured-nation treatment, i.e. 'the most favourable treatment accorded to nationals of a foreign country'; and
- (4) 'treatment as favourable as possible and in any event not less favourable than that accorded to aliens generally in the same circumstances'.

(1) National treatment is to be granted to refugees as regards freedom to practise their religion and the religious education of their children (Article 4); as regards their access to courts, including legal assistance and exemption from *cautio judicatum solvi* (Article 16, paragraphs 1 and 2); with respect to wage-earning employment of refugees who have completed three years' residence in the country, or who have a spouse whom they have not abandoned and who possesses the nationality of the country, or who have one or more children possessing the nationality of the country (Article 17, paragraph 2); as regards rationing (Article 20) and elementary education (Article 22, paragraph 1); with regard to the right to public relief and assistance (Article 23); and in matters of labour legislation and social security (Article 24) and taxation (Article 29).

(2) The same treatment as is accorded to nationals of the country of their habitual residence is to be granted to refugees with regard to the protection of their industrial property, such as inventions, trade marks and trade names, and of their rights in literary, artistic and scientific works (Article 14), and also as regards access to courts, legal assistance and exemption from *cautio judicatum solvi* in countries other than that of their habitual residence (Article 16, paragraph 3).

(3) Most-favoured-nation treatment is to be granted to refugees as regards their right to create and to join non-political and non-profit-making associations and trade unions (Article 15), and the right to engage in wage-earning employment, if the refugees concerned do not fulfil the conditions necessary for the enjoyment of national treatment (Article 17, paragraph 1).

¹ See *First Report of the Private International Law Committee* appointed by the Lord Chancellor (Cmd. 9068).

(4) 'Treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally' is to be given to refugees with regard to acquisition of movable and immovable property, property rights and interests (Article 13); the right to engage on their own account in agriculture, industry, handicrafts and commerce, and to establish commercial and industrial companies (Article 18); to practise the liberal professions (Article 19); to obtain housing (Article 21); and to benefit from higher education (Article 22, paragraph 2).

There is an increasing tendency to accord to refugees the same treatment as is accorded to nationals of their country of residence—a tendency which has found expression in recent multilateral agreements and protocols annexed to such agreements. Not infrequently, the international agency charged with the protection of refugees, be it the Inter-Governmental Committee for Refugees, the International Refugee Organization or, now, the Office of the United Nations High Commissioner for Refugees, has taken the initiative for the extension of these Agreements to refugees. Thus the European Convention on Social and Medical Assistance,¹ the European Interim Agreement on Social Security Schemes relating to Old Age, Invalidity and Survivors,² and the European Interim Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors,³ which provide for national treatment of the nationals of other Contracting States by the Contracting State in whose territory the persons reside, have been supplemented by Protocols assimilating refugees to nationals of the Contracting States for the purposes of these Agreements. A Protocol to the Universal Copyright Convention of 6 September 1952 has likewise been adopted according to which:

'stateless persons and refugees who have their habitual residence in a State party to the Protocol shall, for the purposes of the Convention, be assimilated to the nationals of that State'.

Taken in their entirety, these provisions of the Convention and of multilateral agreements of recent date show an interesting evolution of certain principles of private and public international law. Nationality is largely the basis for the treatment of aliens, not only according to the private international law of many countries, but also in public international law, where the right of diplomatic protection of the State of nationality is the principal safeguard for the minimum standards of treatment of aliens established by international law, and where it is also of special importance in specific fields, as, for instance, in the law of war. The application of this principle has led to conflicts of law in the case of stateless persons and double nationals. As regards the latter, a new principle—the principle of effective nationality—has been developed, particularly since the decision of the Permanent Court of Arbitration in the *Canevaro* case.⁴ This principle has also found expression in the Hague Convention relating to the Conflict of Nationality Laws, 1930 (Article 5).⁵ According to that principle, plural nationals are, in third States, to be considered as nationals of that of the States whose nationality they possess with which they are in fact most closely connected. The Convention relating to the Status of Refugees constitutes in many aspects an extension of this principle. In the case of '*de facto* stateless' refugees, i.e. refugees who still retain the nationality of their country of origin, that nationality is not effective seeing that the protection of the authorities of that country is denied to them. The Convention is marked by a tendency to disregard their nationality for the purpose of their status and to assimilate their status largely to that of the nationals of their country of residence.

¹ *European Treaty Series* No. 14.

² *Ibid.*, No. 12.

³ *Ibid.*, No. 13.

⁴ Scott, *The Hague Court Reports* (1916), pp. 284–96.

⁵ *League of Nations Treaty Series*, vol. 179, No. 4137.

IV. *Application of the Convention*

As to the implementation of the Convention, the Contracting States undertake to communicate to the Secretary-General of the United Nations the laws and regulations which they adopt to ensure the application of the Convention (Article 36). A clause providing that the Contracting States should undertake within a reasonable time, and in accordance with their Constitution, legislative or other measures to give effect to the provisions of the Convention, was opposed by the United Kingdom on the ground that it could lead to the interpretation that, prior to such implementing measures, accession did not imply binding obligations, which was contrary to an accepted principle of international law. Competence is conferred upon the International Court of Justice for the settlement of disputes between the parties relating to the interpretation or application of the Convention which cannot be settled by other means (Article 38).

The Convention contains an interesting innovation in that it expressly provides for an obligation of the Contracting States to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and in particular to facilitate its duty of supervising the application of the provisions of the Convention (Article 35, paragraph 1). 'Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto' is explicitly laid down as one of the tasks incumbent upon the Office of the United Nations High Commissioner for Refugees in Article 8 of its Statute. The function of the international agency charged with the protection of refugees is thus explicitly recognized by the Convention. Treaties in which international organs are charged with the supervision of their application have not been infrequent, but the present Convention is one of the rare instances where an international agency is charged with the supervision of a treaty which in essence is designed to protect individual rights. The United Nations organ for the protection of refugees does not, of course, dispose of any means to enforce the application of the Convention. It can, at best, with the authorization of the General Assembly seek an Advisory Opinion from the International Court of Justice, according to Article 96 of the Charter. Its function of safeguarding the interests of the beneficiaries of the Convention, i.e. the refugees, in its application is nevertheless of considerable importance as the beneficiaries themselves have no *locus standi* in international law. The observation made by Professor Lauterpacht in his *International Law and Human Rights*¹ that the treaties regarding the condition of stateless persons constitute 'a landmark in the assertion of the international personality of the individual' as they enable the Contracting States which are not the States of nationality of the beneficiaries to invoke the provisions of the treaties in their favour, is all the more true of the present Convention, which provides for the interposition of an international agency for the protection of the rights of individuals.

V. *Final clauses*

In this connexion the territorial application clause (Article 40), the federal clause (Article 41) and the reservation clause (Article 42) call for comment. The so-called 'colonial clause' and the federal clause have led to considerable discussion between the representatives of Governments holding opposing views, on the occasion of the drafting of multilateral agreements.² On the question of the territorial application clause

¹ At pp. 55-56.

² Full documentation on the views presented may be found in a Report by the Secretary-General of the United Nations to the Commission on Human Rights on federal and colonial

the Convention follows the traditional lines in that it provides that application of the Convention to the territories for whose international relations a Contracting State is responsible shall not be automatic but optional on a declaration made by the State concerned. It provides that with respect to territories to which the Convention is not extended, each State shall consider the possibility of taking the necessary steps in order to extend the application of the Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

The Convention of 1951 is the first established under the auspices of the United Nations which contains a 'federal clause'. In connexion with other multilateral agreements Federal States have urged the inclusion of a clause taking account of their constitutional inability to undertake binding obligations in respect of matters falling within the jurisdiction of their constituent units. Other States have consistently opposed this demand on the ground that it would create an inequality of obligations between federal and unitary States. The federal clause in the Convention follows, with some modifications, the model established by Article 19 of the Constitution of the International Labour Organization as amended in 1946. According to the clause in the Refugees Convention, the obligations of a federal Government shall, with respect to Articles coming within the legislative jurisdiction of the federal legislative authority, be the same as those of parties which are not federal States. With regard to Articles coming within the legislative jurisdiction of the constituent units, which are not, under the Constitution of the federation, bound to take legislative action, the federal Government merely undertakes to bring such Articles, with a favourable recommendation, to the notice of the appropriate authorities of the constituent States, provinces or cantons.¹

The relevance of a federal clause for non-unitary States varies, in fact, from State to State, according to the degree of decentralization embodied in their Constitution. It would appear that the problem is mainly of importance for federal States outside Europe, while European federal States have no difficulty in accepting treaty obligations on the same footing as unitary States. According to their law, treaties ratified by the federal organs which are competent according to the Constitution abrogate legislation of the constituent units on matters falling within their competence where such legislation is inconsistent with the provisions of the treaty.

With regard to reservations, the solution adopted in Article 42 of the Convention is as follows: Any State may make reservations to Articles of the Convention, with the exception of Articles 1 (definition of refugees), 3 (non-discrimination), 4 (freedom to practise religion), 16, paragraph 1 (free access to courts), 33 (prohibition of expulsion or return to countries of persecution), and 36 to 46 inclusive (the final clauses). The solution adopted was influenced by the view that in a convention of this type universality rather than equality of obligations was the paramount interest.

It is noteworthy that different solutions of the question of reservations were embodied in two multilateral conventions adopted under the auspices of the United

clauses (U.N. Doc. E/1721) and in a Memorandum prepared by the Legal Department of the United Nations Secretariat and presented to the Conference of Plenipotentiaries on the status of refugees and stateless persons (U.N. Doc. A/CONF.2/21).

¹ An interesting feature of the discussion on the federal clause was that the representative of a federal State, namely, Austria, opposed the federal clause as proposed, which followed the model in Article 19 of the Constitution of the International Labour Organization more closely and according to which the Convention would, in regard to matters coming within the jurisdiction of the constituent units, only be in the nature of a recommendation, on the ground that it was contrary to the Austrian Constitution under which the provisions of international instruments ratified by the Central Government were binding on the *Laender*: see *Summary Records* of the Conference (U.N. Doc. A/CONF.2/SR.30), p. 22.

Nations at approximately the same time. The Convention relating to the Status of Refugees adopted the principle of universality. It allows for unilateral reservations, but at the same time declares inadmissible reservations to certain basic Articles. The Convention on Declaration of Death of Missing Persons, adopted at Lake Success on 6 April 1951,¹ follows, on the question of reservations, the Pan-American system. It provides in Article 19 that if a Contracting State does not accept the reservations made by another State it may, within ninety days from the date on which the Secretary-General transmits the reservations to it, notify the Secretary-General that it considers the accession of the State making the reservations as not having entered into force between that State and itself. In such a case the Convention is to be considered as not being in force between such two States.

P. WEIS

ASYLUM TO PRISONERS OF WAR

THE principle that a Detaining Power may, if it desires, grant asylum to prisoners of war who do not wish to be repatriated now appears to be generally admitted.² There has as yet, however, been no satisfactory answer to the questions how the validity of requests for asylum may be ascertained and how those persons genuinely resisting repatriation can be distinguished from those who may be compelled to refuse the repatriation they actually desire because of duress exerted by the Detaining Power or their fellow prisoners.

After hostilities had ended in Korea and those prisoners of war who desired to be repatriated had been restored to the forces of which they were members, there remained over 22,000 prisoners of war in the custody of the United Nations Command and several hundreds in the hands of the Command of the Korean People's Army and Chinese People's Volunteers who had not elected to return.³ In accordance with the

¹ U.N. Doc. A/CONF.1/19: *United Nations Publications*, 1950. V. 1.

² The General Assembly of the United Nations affirmed in its Resolution of 3 December 1952 that 'force shall not be used against prisoners of war to prevent or effect their return to their homelands' (Resolution 610 (VII), *United Nations General Assembly, Official Records, Seventh Session, Supplement No. 20* (U.N. Doc. A/2361), p. 3). The legal position of the United States is reflected in Secretary of State Acheson's statement in Committee I of the General Assembly (*United Nations General Assembly, Official Records, Seventh Session, First Committee* (U.N. Doc. A/C.1/SR.512), pp. 26-27, published as *The Problem of Peace in Korea* (Department of State Publication 4771, 1952)) and in the Memorandum, prepared in the Office of the Legal Adviser, Department of State, entitled 'Legal Considerations Underlying the Position of the United Nations Command regarding the Issue of Forced Repatriation of Prisoners of War'. The views of the British Government are set forth in Korea No. 1 (1953), Cmd. 8793, pp. 11-13. See also Charmatz and Wit, 'Repatriation of Prisoners of War and the 1949 Geneva Convention', in *Yale Law Journal*, 62 (1953), p. 39; Gutteridge, 'The Repatriation of Prisoners of War', in *International and Comparative Law Quarterly*, 2 (1952), p. 207; Lundin, 'Repatriation of Prisoners of War: The Legal and Political Aspects', in *American Bar Association Journal*, 39 (1953), p. 559; Mayda, 'The Korean Repatriation Problem and International Law', in *American Journal of International Law*, 47 (1953), p. 414; Schapiro, 'Repatriation of Deserters', in this *Year Book*, 29 (1952), p. 310.

³ Paragraph 2, Interim Report of the Neutral Nations Repatriation Commission, 28 December 1953, transmitted to the Commander-in-Chief, United Nations Command, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, by letter (No. NNRC/REP/1) from the Chairman of the Neutral Nations Repatriation Commission, dated 28 December 1953 (hereinafter referred to as the Interim Report, N.N.R.C.); Separate Interim Report by the Swedish and Swiss Members of the Neutral Nations Repatriation Commission, 27 December 1953, transmitted to the Chairman of the Neutral Nations Repatriation Commission by letter from the Swedish and Swiss Members, dated 27 December 1953 (hereinafter referred to as the Minority Interim Report, N.N.R.C.).

Resolution of the United Nations General Assembly of 3 December 1952,¹ the Terms of Reference for the Neutral Nations Repatriation Commission annexed to the Korean Armistice Agreement provided that prisoners who had not 'exercised their right to be repatriated' should be placed in the custody of a Neutral Nations Repatriation Commission (N.N.R.C.), composed of members appointed by Sweden, Switzerland, Poland, Czechoslovakia, and India.² The representative of India was designated as chairman and executive agent of the N.N.R.C., and India was called upon to furnish the necessary custodial forces.³ The Commission was charged with the responsibility of affording the opportunity of repatriation to those prisoners in its custody who signified a desire to return to their own forces.⁴ The States to which the prisoners of war belonged were permitted to send representatives to such prisoners for the purpose of conducting 'explanations and interviews' with a view to explaining their rights to them and informing them 'of any matters relating to their return to their homelands'.⁵ The projected Political Conference for the settlement of the Korean problem was to endeavour, within a period of thirty days, to determine what disposition should be made of those prisoners of war who still refused repatriation after the ninety-day period of 'explanations and interviews'. A crucial sentence of the Terms of Reference then declared:

'The Neutral Nations Repatriation Commission shall declare the relief from the prisoner of war status to civilian status of any prisoners of war who have not exercised their right to be repatriated and for whom no other disposition has been agreed to by the Political Conference within one hundred and twenty (120) days after the Neutral Nations Repatriation Commission has assumed their custody.'⁶

The interpretation of the Agreement was stated to 'rest with the Neutral Nations Repatriation Commission'.⁷ The Terms of Reference contain throughout references to the Geneva Prisoners of War Convention of 1949,⁸ the provisions of which both parties to the Korean conflict had undertaken to apply.⁹

Commissions with neutral representation had in a number of previous instances been employed to supervise the repatriation of prisoners. The Peace Conference to settle the Chaco conflict had in 1936 established a 'Special Repatriation Commission', of which officers of neutral States made up the majority, 'to deal with everything connected with the reciprocal return of prisoners of war at present in Bolivia and Paraguay'.¹⁰ In addition to the approximately 19,500 prisoners of war who were repatriated under the

¹ As cited in n. 2, p. 489, above.

² See Paragraph 1 of the Terms of Reference for the Neutral Nations Repatriation Commission annexed to the Agreement between the Commander-in-Chief, United Nations Command, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, concerning a Military Armistice in Korea, signed at Panmunjom (Korea) on 27 July 1953 (hereinafter referred to as Terms of Reference); United States, *Treaties and Other International Acts Series*, No. 2782.

⁴ *Ibid.*, paragraph 10.

⁶ *Ibid.*, paragraph 11.

⁸ *United Nations Treaty Series*, 75 (1950), p. 135.

⁹ Telegram from Secretary of State Acheson to the International Committee of the Red Cross, dated 5 July 1950, reproduced in *Le Comité international de la Croix-Rouge et le Conflit de Corée; Recueil de documents* (1952), vol. i, p. 13; Letter from the Representative of the United States of America to the Secretary-General of the United Nations, dated 5 July 1951, in *Department of State Bulletin* (hereinafter cited as *D.S.B.*), vol. 25 (1951), p. 189; U.N. Doc. S/2232, 6 July 1951; Department of State Press Release 582, 24 July 1952, in *D.S.B.*, vol. 27 (1952), p. 171.

¹⁰ See Peace Conference Resolution Setting up Military Commission to Supervise Exchange of Prisoners of War, approved 3 February 1936, in *The Chaco Peace Conference: Report of the Delegation of the United States of America to the Peace Conference held at Buenos Aires, July 1, 1935-January 23, 1939* (G.P.O., 1940), p. 87.

supervision of the Special Repatriation Commission, six Paraguayan prisoners in Bolivian custody were set at liberty and not required to return to Paraguay and 71 Bolivian prisoners of war in Paraguay were similarly given their freedom without being forced to return to the country in the forces of which they had served.¹ An 'International Commission', composed of three neutral members and a representative of the Greek and Turkish Governments respectively, directed the repatriation of prisoners of war and civilian internees held by Greece and Turkey in 1923.² More recently, in the Armistice concluded between Egypt and Israel, it was specified that the United Nations should supervise the repatriation of prisoners held by the forces of the two countries.³

If the principle of neutral supervision of the return of prisoners in Korea was not unprecedented, the complexity and delicacy of the task to be performed was altogether novel. Soon after the prisoners who had not elected to be repatriated had been placed in the custody of the Indian Custodian Force, the N.N.R.C. and the two detaining sides were involved in controversy over such matters as the presence of observers at the transfer of custody⁴ and the distribution of a leaflet of explanation to the prisoners.⁵ All the members of the N.N.R.C. agreed that the prisoners of war were politically organized and that these organizations exercised some influence over the prisoners, but they were unable to agree on the extent of their control.⁶ Although the Polish and Czechoslovakian members of the N.N.R.C. contended that those persons who were alleged to be 'agents' coercing the prisoners forcibly into declining repatriation should be segregated, the other members of the Commission found it either undesirable or beyond the resources of the Custodian Force to attempt this measure.⁷ The initiation of 'interviews and explanations' was delayed by the necessity of providing suitable accommodation for this process and by disputes over the rules of procedure for their conduct.⁸ When all arrangements had been made, groups of prisoners from among those

¹ *Résumé of Repatriation of Bolivian and Paraguayan Prisoners, Final Accounting, in The Chaco Peace Conference* (cited above, p. 490, n. 10), p. 93.

² Article 6 of the Agreement between Greece and Turkey respecting the Reciprocal Restitution of Interned Civilians and the Exchange of Prisoners of War, signed at Lausanne on 30 January 1923, printed in *American Journal of International Law*, 18 (1924), Suppl., p. 90.

³ Article 9 of the General Armistice Agreement between Egypt and Israel of 24 February 1949; reproduced in the *New York Times* newspaper, 25 February 1949, p. 20, col. 1.

⁴ Paragraphs 3-7 of the Interim Report, N.N.R.C.; paragraphs 2-4 of the Minority Interim Report, N.N.R.C. Reference is made to both Reports in the following footnotes in view of the fact that General Hull, the Commander-in-Chief of the United Nations Command, informed General Thimayya, Chairman of the N.N.R.C., that: 'Of the two reports, I find that prepared by the Swedish and Swiss delegations much more objective, factual and indicative of the operations of the Neutral Nations Repatriation Commission' (letter dated 4 January 1954, printed in *D.S.B.*, vol. 30 (1954), p. 90).

⁵ Paragraphs 8-10 of the Interim Report, N.N.R.C.; paragraph 6 of the Minority Interim Report, N.N.R.C.

⁶ Paragraphs 11-18 and 86-94 of the Interim Report, N.N.R.C.; paragraphs 5, 7, 9, 60 and 66 of the Minority Interim Report, N.N.R.C.

⁷ Paragraphs 11-18 and 52-54 of the Interim Report, N.N.R.C.; paragraphs 10-19 of the Minority Interim Report, N.N.R.C. In maintaining that an attempt to break up the organizations of prisoners of war or to segregate the leaders of the prisoners would constitute segregation on political grounds, the Swedish and Swiss delegations were apparently referring to Article 16 of the Geneva Prisoners of War Convention of 1949, which precludes adverse distinctions based on the political opinions of prisoners of war. Articles 79 to 81 of the Convention also recognize that 'prisoners' representatives' may be elected to further the 'physical, spiritual and intellectual well-being of prisoners of war'.

⁸ Paragraphs 28-37 and 19-25 of the Interim Report, N.N.R.C.; paragraphs 27-32 and 20-24 of the Minority Interim Report, N.N.R.C.; see also N.N.R.C. Rules of Procedure governing Explanations and Interviews.

formerly detained by the United Nations Command and by its enemies refused to emerge from their compounds for the explanation process.¹ The Polish and Czechoslovakian members of the Commission proposed that force should be used to bring the prisoners out,² while the Swiss and Swedish representatives maintained that such action would be a violation of paragraph 3 of the Terms of Reference, which forbade the use of 'force or threat of force' against the prisoners, and of the Geneva Prisoners of War Convention of 1949.³ The Indian delegation felt that force might be used in discharging the functions and responsibilities of the Commission, but, in the absence of a unanimous vote in the N.N.R.C., it was unwilling to take measures which might lead to heavy casualties amongst the prisoners.⁴ Even when the prisoners did present themselves for 'explanations', it proved difficult at the end of each day to segregate those who had been through this process from those who had not. It was feared that this commingling might lead to a renewal of coercion.⁵ The individual interviews were often scenes of disorder, with the prisoners turning on the individuals who had been sent to interview them.⁶ As a result of the delays which these and other problems had occasioned, only a relatively small proportion of the prisoners had gone through the explanation process by the end of the ninety-day period which had been prescribed for that purpose by the Terms of Reference.⁷

The period for explanations having ended on 23 December 1953, the N.N.R.C. was forced to give consideration to the final disposition of the prisoners in its custody. After soliciting the views of the two opposing Commands,⁸ the Chairman of the N.N.R.C. communicated his conclusions⁹—which were not concurred in by the Swiss and Swedish delegations¹⁰—to the Commander-in-Chief of the United Nations Command. He noted that the explanation procedure had been carried out with respect to only a small proportion of the prisoners of war and declared that the disposition of those prisoners who had not exercised their right to repatriation should be referred to the Political Conference mentioned in paragraph 11 of the Terms of Reference of the N.N.R.C. These procedures not having been fully implemented, the Commission regarded itself as incompetent to declare the relief of the prisoners to civilian status at the end of 120 days

¹ Paragraphs 39–41, 81, 84 and 85 of the Interim Report, N.N.R.C.; paragraphs 33, 34 and 43 of the Minority Interim Report, N.N.R.C.

² Paragraph 49 of the Interim Report, N.N.R.C.; paragraph 37 of the Minority Interim Report, N.N.R.C.

³ Paragraph 48 of the Interim Report, N.N.R.C.; paragraph 38 of the Minority Interim Report, N.N.R.C.

⁴ Paragraphs 50 and 51 of the Interim Report, N.N.R.C.; paragraphs 40, 41 and 67 of the Minority Interim Report, N.N.R.C.

⁵ Paragraphs 63–66 and 72–80 of the Interim Report, N.N.R.C.; paragraphs 50–52, 55 and 57 of the Minority Interim Report, N.N.R.C.; see paragraph 20 of the N.N.R.C. Rules of Procedure governing Explanations and Interviews, which provides for the separation in custody of the three categories: (a) those who had applied for repatriation, (b) those who had been given explanation but had not submitted their applications for repatriation, and (c) those who had neither been given explanation nor applied for repatriation.

⁶ Paragraphs 67, 68 and 82 of the Interim Report, N.N.R.C.; paragraph 58 of the Minority Interim Report, N.N.R.C.

⁷ Annex 20 to the Interim Report, N.N.R.C.; see also Resolution adopted at the 73rd meeting of the N.N.R.C. held on 21 January 1954.

⁸ Letter from the Chairman, N.N.R.C., to the Commander-in-Chief, United Nations Command, dated 2 January 1954.

⁹ Letter from the Chairman, N.N.R.C., to the Commander-in-Chief, United Nations Command, dated 14 January 1954, reproduced in *D.S.B.*, vol. 30 (1954), p. 113.

¹⁰ Statements by the Swiss and Swedish members of the N.N.R.C., 14 January 1954: *D.S.B.*, vol. 30 (1954), p. 115.

of custody. The Chairman concluded that the only lawful course the N.N.R.C. could pursue was to restore the prisoners to the custody of the former detaining sides immediately prior to 23 January 1954, the date which marked the end of 120 days of custody, but he warned both sides that:

'... the alteration of the status of POWs either by declaration of civilian status or disposition in any other manner requires the implementation of the procedures of explanation and political conference to precede it... unless the two commands agree on alternative procedures or courses of action in regard to status and disposition of POWs. Any unilateral action by any party concerned will not be in conformity with the said terms of reference.'¹

The United Nations Command maintained the position that, in view of the mandatory provisions of the Terms of Reference requiring the declaration of relief from prisoners of war to civilian status at the end of 120 days, the prisoners should be released at that time.² The full explanation period had expired, and the Political Conference could not be said to constitute a condition precedent to the release of the prisoners. The persons who had been in the custody of the N.N.R.C. were, however, released to the United Nations Command without acceptance of the condition which the Chairman of the N.N.R.C. had sought to impose. On 23 January 1954 the Command declared that it considered that the prisoners who had been returned to its custody 'now have civilian status'.³

It is not clear to what extent the position taken by the Chairman and by two members of the N.N.R.C. was dictated by purely legal considerations. Paragraph 11 of the Terms of Reference enjoined the N.N.R.C. to release to civilian status those unrepatriated prisoners 'for whom no other disposition had been agreed to by the Political Conference' within 120 days after the assumption of custody by the N.N.R.C. The explanation period was expressly limited to a period of ninety days by paragraphs 8 and 11 of the Terms of Reference. The first sentence of paragraph 11 then gave the Political Conference thirty days in which to endeavour to settle the question of the unrepatriated prisoners. Failing an alternative solution within this period, the prisoners were to be released. The discussion in the General Assembly of the Resolution of 3 December 1952, which established the pattern for the Terms of Reference, indicates that the majority of the delegates were aware that the procedure proposed was designed to terminate the detention of the prisoners at the end of a fixed period and without the interposition of further conditions precedent.⁴ Consistently with these views, the agreement

¹ Paragraph 20 of the letter cited in n. 9, p. 492, above. See also Resolution adopted at the 73rd meeting of the N.N.R.C. held on 21 January 1954, expressing the same view.

² Letter from the Commander-in-Chief, United Nations Command, to the Chairman, N.N.R.C., dated 16 January 1954: *D.S.B.*, vol. 30 (1954), p. 115; see also letter from the Chairman, N.N.R.C., to the Commander-in-Chief, United Nations Command, dated 18 January 1954: *D.S.B.*, vol. 30 (1954), p. 153, in which the views expressed in his letter of 14 January 1954 are reiterated.

³ Statement of the Commander-in-Chief, United Nations Command, 23 January 1954: *D.S.B.*, vol. 30 (1954), p. 152.

⁴ The Indian delegate, for example, stated in Committee I that 'it would not be in the interests of the prisoners to continue their imprisonment while the political questions were debated in the political conference' and that the Indian proposal was 'designed to terminate their detention' (*United Nations General Assembly, Official Records, Seventh Session, First Committee* (U.N. Doc. A/C.1/SR.535, p. 176). Mr. Acheson noted that 'those who could not be repatriated without the use of force within a definite period of time must be released' (*ibid.*, U.N. Doc. A/C.1/SR.529, p. 140). Other delegates, including those of Great Britain (*ibid.*, U.N. Doc. A/C.1/SR.526, p. 117), Australia (*ibid.*, U.N. Doc. A/C.1/SR.527, p. 124), Sweden (*ibid.*, U.N. Doc. A/C.1/SR.530, p. 149), and Canada (*ibid.*, U.N. Doc. A/C.1/SR.533, p. 161), expressed the same view.

balanced the necessity of allowing the prisoners a free choice between repatriation and non-repatriation against the humane object of freeing all prisoners promptly after the termination of hostilities by providing a limited period of neutral custody with opportunity for repatriation. The effect of making the decision of the Political Conference a necessary condition of the disposition of the prisoners would have been to condemn them to an indefinite period of confinement at the option of whichever side might wish to delay or even preclude the holding of the Political Conference.¹ Such an unwarranted prolongation of the period of captivity of prisoners of war runs counter to both Article 75 of the Geneva Prisoners of War Convention of 1929² and the even more stringent requirement of Article 118 of the 1949 Convention that prisoners be 'released and repatriated without delay after the cessation of active hostilities'.

The Chairman of the N.N.R.C. relied on the fact that the Terms of Reference gave authority to the N.N.R.C., acting by majority vote, to interpret the Agreement. It is questionable, however, whether this provision can reasonably be construed to give the Commission authority, in the guise of interpreting the Terms of Reference, to impose upon the belligerents an obligation to maintain prisoners in custody for an indefinite period after the N.N.R.C. itself had been dissolved, either by reason of the provisions of the Terms of Reference or because the Custodian Force, India, no longer found itself able to maintain custody of the prisoners. It would accordingly appear proper to conclude that, while the N.N.R.C. had authority to interpret the Terms of Reference with regard to questions arising during the Commission's existence, it had no power so to interpret the Agreement as to create legal obligations having effect after the termination of its functions through the device of placing conditions on the restitution of the prisoners.³ There also exists the further question whether the views of the N.N.R.C. were sufficiently reasonable to constitute in legal effect no more than an interpretation of the agreement.

In connexion with the question of the final disposition of the prisoners there arose the question of individuals who had committed offences while in the custody of the Custodian Force, India.⁴ A total of seventeen anti-communist Chinese and Koreans were held by India on charges of murder at the time of the release of the other prisoners to the original detaining sides.⁵ Proceedings against at least three of these had been initiated by an Indian court-martial.⁶ Although India could not strictly be regarded as a Detaining Power for the persons in its custody, their position is somewhat analogous to that of prisoners of war received by a neutral state for internment. Such individuals are, under Article 4 B. (2) of the Geneva Prisoners of War Convention of 1949, treated as prisoners of war under the Convention, which contains stipulations regarding the discipline of prisoners. Furthermore, paragraph 7 of the Terms of Reference of the N.N.R.C. gave it authority 'to exercise its legitimate functions and responsibilities for the control of prisoners of war under its temporary jurisdiction'. The taking of judicial

¹ See letter from the Commander-in-Chief, United Nations Command, to the Chairman, N.N.R.C., dated 16 January 1954: *D.S.B.*, vol. 30 (1954), p. 115. The efforts of the Special Envoy of the United States to bring about an early convening of the Korean peace conference and their frustration by the intransigence of the delegates from Communist China and North Korea are described by Dean, 'Attempted Negotiations at Panmunjom', in *D.S.B.*, vol. 30 (1954), p. 15.

² *League of Nations Treaty Series*, vol. 118, p. 343.

³ See the Swiss member's Statement of 14 January 1954: *D.S.B.*, vol. 30 (1954), p. 115.

⁴ Paragraph 93 of the Interim Report, N.N.R.C., and Annex 19 thereto; paragraph 8 of the Minority Interim Report, N.N.R.C.

⁵ See the *New York Times* newspaper, 25 January 1954, p. 1, col. 7.

⁶ See *ibid.*, 7 January 1954, p. 9, col. 8.

measures against prisoners accused of murder was therefore a proper step. On the other hand, since the custody of the N.N.R.C. was a temporary measure prior to the required release as civilians of prisoners declining repatriation, it is doubtful whether Article 119 of the Prisoners of War Convention of 1949, which permits a Detaining Power to withhold from repatriation persons against whom criminal proceedings for an indictable offence have been initiated (if necessary, until the completion of the punishment), could justifiably be applied. The accused prisoners were properly returned to the former Detaining Power,¹ which should, it would seem, have continued proceedings against them to the extent permitted by their release from prisoner of war to civilian status.

The United States soldiers refusing repatriation were discharged by the United States Army shortly after the termination of the 120-day period of custody by the Custodian Force, India. The public announcement of this action² indicates that it was assumed that paragraph 11 of the Terms of Reference required that prisoners of war refusing repatriation be treated as civilians in municipal as well as international law. The Agreement is, however, capable of the interpretation that in referring to the 'release from prisoner of war status to civilian status', it alluded to the standing of prisoners *vis-à-vis* the former Detaining Power and meant no more than that such individuals were to be treated, as far as the former Detaining Power was concerned, as if they were peaceful civilians. Whether the provision similarly obliged the army in which they served to discharge them from their military status and to refrain from treating them as deserters is open to question. If paragraph 11 had been intended to provide that a prisoner's own country was to treat him as a civilian and not try him as a deserter, it is peculiar that the Terms of Reference did not include the amnesty provision which has often been inserted in past armistices when this result has been intended.³

Although the implementation of the procedures contemplated by the Terms of Reference for the N.N.R.C. was largely a failure, the Agreement nevertheless has considerable significance as an attempt to provide the means whereby prisoners of war might be permitted to make a free choice between repatriation and non-repatriation. The breakdown of the machinery which was established naturally raises the question how these difficulties may be avoided in the future when a Detaining Power offers asylum to persons numbered not in tens of thousands but in hundreds of thousands. It must be assumed that the genuineness of prisoners' desires not to be repatriated ought to be subject to impartial verification so that individuals will not renounce their right to repatriation under compulsion. Any legal rules which are framed must of necessity be such as to make it difficult for a belligerent to withhold prisoners on the pretext that they are seeking asylum. If these premisses are correct, it would follow that:

1. Such determinations must be promptly made, so as not to cause the prisoners to be held in confinement for long periods after the termination of hostilities. In the case of parties to the Geneva Prisoners of War Convention of 1949, Article 6 of that Convention requires that any special agreement on procedures to test the validity of claims to asylum should not adversely affect the right of prompt release and repatriation guaranteed by Article 118.

2. The individual prisoner must be freed from duress, whether exerted by the Detaining Power or by other prisoners of war. If this is to be accomplished, the individual must be segregated from his fellows and from the personnel of the Detaining Power for long

¹ See the *New York Times* newspaper, 17 February 1954, p. 4, col. 4.

² Department of Defense Press Release No. 75-54, dated 25 January 1954.

³ An extended discussion of these clauses is to be found in Schapiro, 'Repatriation of Deserters', in this *Year Book*, 29 (1952), pp. 318 ff.

enough for him to make his decision freely. An appeal directed to him by his own country may also be necessary if he has been subjected to propaganda or pressures by other prisoners or by the Detaining Power. How these two desiderata are to be reconciled lies at the root of the problem.

Preliminary screening by the Detaining Power is extremely helpful but cannot be depended upon as a final and conclusive ascertainment of the wishes of each prisoner. Measures of this nature were taken by the United Nations Command in Korea, which did its utmost to provide the conditions for a free choice by the prisoners in its custody.¹ Nevertheless, a number of those who stated at that time that they did not wish to be repatriated later expressed a desire to return to their own forces. An unscrupulous Detaining Power, on the other hand, could not be expected to accomplish a fair screening. Even under the best of conditions, prisoners may change their minds when the possibility of repatriation assumes more immediacy or as the result of persuasion by other prisoners. The assistance of the Protecting Power, if one be in existence, might be sought, but it would have no greater ability to keep prisoners from reversing their previous decisions or from being influenced by other prisoners or by the Detaining Power after the most impartial of screenings. The difficulty and complexity of the task might, in any case, make it beyond the powers or desires of the Protecting Power.

The release of prisoners not desiring repatriation, while hostilities are yet in progress, would permit a procedure to be established whereby the prisoner would be accorded a free choice between the courses open to him and then allowed to go his way as a civilian if he claimed asylum. Such action would, however, probably be a violation of Article 7 of the Geneva Prisoners of War Convention of 1949, which precludes prisoners of war from renouncing their rights. The history of this Article in the Geneva Conference indicates in the strongest terms that it was intended to prohibit a prisoner of war from giving up his status, with a view to becoming either a civilian or a member of the armed forces of the Detaining Power, even if he were to do so entirely voluntarily.² This

¹ Forty-fourth Report of U.N. Command Operations in Korea, for the Period 16-30 April 1952 (U.N. Doc. S/2700): *D.S.B.*, vol. 27 (1952), p. 232; Special Report of the Unified Command on the United Nations Action in Korea, 18 October 1952 (U.N. Doc. A/2228), in *The United States and the Korean Problem: Documents 1943-1953* (S.Doc. No. 74, 83rd Cong., 1st Sess. (1953)), p. 71. The questions used were designed to encourage a maximum number of prisoners to return to the Communist side.

² Article 7 was put in the form in which it ultimately appeared in the Prisoners of War Convention of 1949 at the XVIIth International Red Cross Conference at Stockholm in 1948 (see *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. i, p. 74). At the Geneva Conference of 1949 it was pointed out by M. Pilloud of the International Committee of the Red Cross that the provision was intended to protect prisoners 'against the temptation of giving up their status for another, for instance that of a civilian worker, or to join the forces of the Detaining Power' and that it created 'obligations incumbent upon the persons under detention' (*ibid.*, vol. ii, sec. A, p. 17). Various proposals were made that prisoners of war be permitted to renounce their rights if they did so entirely voluntarily, but the Conference voted against such amendments and adhered to the original text on the basis that it would ultimately redound to the benefit of prisoners to impose a comprehensive prohibition (*ibid.*, vol. ii, sec. A., pp. 17, 18, 28, 56, 89 and 110).

There is obviously a distinction in logic as well as in law between the release of a prisoner during hostilities and his release as an incident of the repatriation of prisoners generally, for it is only at the moment that the prisoner is about to be returned to his own forces that his need for asylum arises. So long as he is being detained as a prisoner of war and there is no immediate prospect of his return, he has a secure refuge from the actions of his own State. Article 7 refers to a period anterior to the prisoner's anticipated repatriation (cf. the views of Mr. Vyshinsky, as expressed to Committee I of the General Assembly prior to the adoption of the Resolution of 3 December 1952, *United Nations General Assembly, Official Records, Seventh Session, First Committee* (U.N. Doc. A/C.1/SR.521), p. 89).

Article would not preclude the release from prisoner of war status of persons lawfully ascertained not to fall within the definitions established in Article 4 of that Convention, as, for example, by reason of their being in fact civilians.¹ There is also room for the view that persons conscripted into the armed forces of the enemy in violation of international law² should not be held as prisoners of war.³ It may be surmised that these considerations were the basis for the reclassification as civilian internees and later release by the United Nations Command of some 37,500 prisoners, large numbers of whom were found to have been nationals of the Republic of Korea who had been impressed into the service of the North Korean forces.⁴

In the absence of satisfactory methods for giving effect to the requests of prisoners of war for asylum prior to the end of hostilities, the device of placing prisoners who profess not to desire repatriation in the hands of a neutral power for a specified period, during which they will be free from coercion of any sort, may be the most satisfactory solution. It is not enough that the majority of the prisoners who are placed in the temporary custody of the neutral State eventually demonstrate that they genuinely desire not to be repatriated. Justice is achieved only if it is proved that each individual who professes to seek asylum is not acting under compulsion in any form.⁵ The neutral power which is to undertake this task will have a heavy burden if it is thus to assure itself of the validity of each claim to asylum. Further problems will be presented if some of the prisoners do not desire to remain in the territory of the Detaining Power but wish to settle in third States, thus requiring the neutral custodian to seek a country willing to accept them.⁶ This procedure presupposes, moreover, that it will be possible to find a true neutral acceptable to both belligerents in a future war.

The key to this difficult procedural problem may lie in a frank recognition of the paradox presented by the necessity of subjecting the actions of the United Nations Command, acting on behalf of the international community, to review by a group of 'neutral' States which are themselves members of the United Nations. It might be regarded as consistent with the nature of international forces for the repression of acts of aggression in violation of the Charter that these forces should themselves provide the tribunals for determining the validity of requests for asylum. A possible corollary of this view is that the enemy forces would have no authority to grant asylum to persons

¹ The 'competent tribunals' established pursuant to Article 5 of the Prisoners of War Convention of 1949 might be of assistance in performing this task.

² See *In re Wagner and Others*, decided by the French Permanent Military Tribunal at Strasbourg on 3 May 1946: *Law Reports of Trials of War Criminals*, vol. 3 (1948), p. 23; *Annual Digest and Reports of Public International Law Cases*, 1946, Case No. 165.

³ During the American Civil War the Judge Advocate General of the Army advised that soldiers of the Federal Army who were induced by the privation and suffering they underwent as prisoners of the Confederate troops to enlist in the enemy forces should upon recapture or surrender be returned to duty with their regiments without punishment (*Digest of Opinions of the Judge Advocates General of the Army*, 1912 (1917), p. 1076).

⁴ Forty-fourth Report of U.N. Command Operations in Korea, as cited in n. 1, p. 496, above, at p. 231; Special Report of the Unified Command on the United Nations Action in Korea (loc. cit. above), at p. 70.

⁵ See in this connexion the letter from the Commander-in-Chief, United Nations Command, to the Chairman, N.N.R.C., dated 5 October 1954: *D.S.B.*, vol. 29 (1953), p. 567; and letter from the Chairman, N.N.R.C., to the Commander-in-Chief, United Nations Command, dated 10 October 1954.

⁶ India was forced to ask the assistance of the United Nations in finding States willing to receive Korean prisoners of war who requested asylum in neutral countries (see the *New York Times* newspaper, 12 February 1954, p. 2, col. 7), and found it necessary to transport such prisoners to India pending arrangements for their permanent accommodation (see *ibid.*, 19 February 1954, p. 4, col. 1). See also Charnatz and Wit, loc. cit., p. 414.

deserting from forces acting on behalf of the international community. This may indeed be one of the points at which the unlawfulness of certain forms of warfare must work a modification in the law concerning the conduct of warfare.¹ Whether the appropriate time for these changes in the law has yet come is open to grave doubt.²

R. R. BAXTER³

THE REFORM OF THE MIXED COURT AT TANGIER

ON 10 November 1952 an Agreement relating to the reform of the Mixed Court at Tangier was signed on behalf of the United Kingdom, France, Spain and Italy (the four Powers which are signatories of the Tangier Convention) and communicated, for their adherence, to the Powers which have acceded to the Tangier Convention.⁴ The provisions of this Agreement are, in general, based on recommendations made by, and a draft *Dahir* drawn up by, a Committee of Legal Experts which sat for six weeks in Tangier in the summer of 1952. The draft *Dahir* in the form in which it appears in the Agreement was recommended to His Shereefian Majesty for adoption and was signed by him on 10 June 1953, and the 'new International Jurisdiction' was formally inaugurated on 17 November 1953. Thus, more than twenty-four years after the United Kingdom, France, Spain and Italy had undertaken, in an Agreement signed at Paris on 25 July 1928,⁵ 'to cause a revised scheme for the international tribunal of Tangier to be elaborated', some of the reforms for which this revised scheme was intended to provide have at last been achieved.

At first sight these reforms might seem to be of little general interest, but if they are seen against the wider background of the international administration of Tangier they appear to be worth some consideration by international lawyers. Tangier has long been 'one of the major factors on the world diplomatic chess-board'⁶ and it is at the present time the one example of a territory under international government. Its status is without parallel; it has been variously defined as a 'condominium of select States'⁷ and as 'un régime de souveraineté dispersé ou de souverainetés concurrentes'.⁸

The interest of the major Powers in Morocco is shown by a number of treaties which were negotiated in the nineteenth century between such Powers and the Sultan of Morocco.⁹ All of these treaties, either directly or by means of a most-favoured-nation clause, provided capitulatory rights and privileges for the nationals of these Powers. During the nineteenth century, therefore, jurisdiction over the majority of foreigners

¹ See 'Should the Laws of War Apply to United Nations Enforcement Action; Report of the Committee on the Study of Legal Problems of the United Nations', in *Proceedings of the American Society of International Law*, 1952, p. 216; Lauterpacht, *supra*, pp. 206-243; Wright, 'The Outlawry of War and the Law of War', in *American Journal of International Law*, 47 (1953), p. 365.

² See Baxter, 'The Role of Law in Modern War', in *Proceedings of the American Society of International Law*, 1953, p. 90.

³ The views expressed in this Note are those of the author.

⁴ By 14 July 1953 the adherences of all these Powers had been received.

⁵ See *British Treaty Series*, No. 25 (1928), Cmd. 3216.

⁶ See Delore in *American Journal of International Law*, 35 (1941), p. 140, at p. 145.

⁷ See Fenwick, *ibid.* 23 (1929), p. 141.

⁸ See Del Castillo, 'L'Expérience internationale de Tanger', in *Revue Internationale Française du Droit des Gens*, 20 (1951), p. 172.

⁹ Treaties were concluded between the Sultan of Morocco and the following Powers: Great Britain (1856), Sweden, Denmark, France, Spain, the United States of America, the Netherlands, Belgium, Germany and Austria.

in Morocco was exercised, both in criminal and in civil matters, by the Consular Courts of the various States which had entered into treaty relations with the Sultan. Both the Madrid Convention of 1880 and the Act of Algeciras of 1906 gave full recognition to the capitulatory régime thus established and, as the result of the Act of Algeciras, various spheres of government—a regular police force, a banking system, and the organization and control of the customs service—passed into European hands. Many of these activities centred on Tangier, in which city there resided the diplomatic representatives accredited to the Shereefian Government. Furthermore, through the 'Conseil Sanitaire', the 'Comité d'Hygiène' and the Office of Public Works, and, in performing the functions entrusted to them by various provisions of the Act of Algeciras, the diplomats and consular representatives resident in Tangier had come to control much of the civic life of the whole population of the city which was recognized as the centre of international activities in Morocco.

Because of its international character and the fact that all the major Powers were interested in ensuring its neutrality, the desirability of a special régime for Tangier came to be increasingly recognized, and a further impetus to its establishment was given by the Protectorate Treaty of 20 March 1912 (Treaty of Fez)¹ and the Franco-Spanish Agreement of 27 November 1912,² which resulted in the establishment of the French and Spanish Zones of Morocco. The Protectorate Treaty provided specifically (in Article 1) that 'la ville de Tanger gardera le caractère spécial qui lui a été concédé et qui sera déterminé par une organisation municipale'. Similarly, the Franco-Spanish Agreement provided that 'la ville de Tanger et ses environs seront dotés d'un régime spécial qui sera déterminé ultérieurement et formeront une zone entre les frontières plus bas décrites'. In 1913 a draft Statute was drawn up for the purpose of instituting an International Zone of Tangier.³ The outbreak of the First World War prevented the signature of this draft Statute.

In 1923 the International Zone which had been envisaged eleven years earlier came into existence as the result of the Paris Conference of 1923. A Statute providing for the organization of the International Zone of Tangier was drawn up and embodied in a Convention which was signed on 18 December 1923 by Great Britain, Spain and France.⁴ This Convention provided for the permanent neutrality of Tangier and set up an international administration for two hundred square miles of Moroccan territory, consisting of Tangier and its environs. Under the 1923 Convention, the Sultan's legislative, administrative and executive powers were delegated to an international administration working through its two chief organs, the Legislative Assembly and the Committee of Control.⁵

Article 48 of the Convention provides for the establishment of a Mixed Court 'to replace the existing consular jurisdiction', and Article 13 provides that 'as a result of the establishment at Tangier of the Mixed Court . . . the capitulations shall be abrogated in the [International] Zone'. The details of the organization of the Mixed Court were provided for in a draft *Dahir* annexed to the Convention;⁶ this *Dahir*, under Article 48 of the Statute, could 'only be modified with the consent of all the Powers signatories of the Act of Algeciras'. The draft *Dahir* was promulgated by the Sultan on 16 February 1924, and the Mixed Court thus set up began to function on 1 June

¹ *British and Foreign State Papers*, vol. 106, p. 1023.

² *Ibid.*, p. 1025.

³ See Hudson in *American Journal of International Law*, 21 (1927), pp. 231-7.

⁴ *British Treaty Series*, No. 23 (1924).

⁵ Article 5 of the 1923 Convention.

⁶ The French text of the draft *Dahir* is reproduced in *British Treaty Series*, No. 23 (1924).

1925. Up to 1928 the Court consisted of four permanent and professional judges (*membres titulaires*) assisted by lay assessors (*membres adjoints*). From 1925 to 1928 there were two British judges, one Spanish judge, and one French judge. These judges were nominated by their respective Governments and appointed by Shereefian *Dahir*. The lay assessors were nominated by the Consuls of the Algeciras Powers in Tangier from amongst their nationals resident there. They might belong to any profession, except that they might not be members of the legal profession practising in Tangier and might not be persons holding any public office. The lay assessors, it is clear, were a last vestige of the capitulatory régime and the reason for their existence was the desire to preserve, as far as was compatible with the existence of an international régime and a Mixed Court, the right formerly enjoyed by nationals of the Algeciras Powers to be tried and to have their civil disputes decided by judges of their own nationality. The same motive can be traced in the provisions for the trial by jury of serious criminal offences which are contained in Articles 9 and 10 of the *Dahir* of 16 February 1924. In the simplest case—that in which there was only one accused person or all the accused persons were of the same nationality—the jurors were all drawn by lot from a list of jurors of the same nationality as the accused.

The organization of the Mixed Court was based on the French legal system. The 1924 *Dahir* provided that two of the permanent members should perform the functions of a *juge de paix* and another should fulfil the functions devolving on a *juge d'instruction*. A section of the Court, consisting of a permanent member as President and two lay assessors, was to act as a 'section de mises en accusation'. A permanent member (as President) and two lay assessors were to act as a court of first instance in civil, commercial, administrative and 'correctional' matters, and were to act as a court of appeal for cases dealt with by the *juge de paix*. Appeals from the section acting as a court of first instance were to be heard by three members of the Court (who had had nothing to do with the judgment against which the appeal was lodged) assisted by two lay assessors who similarly had had no connexion with the judgment appealed against. Criminal cases were to be decided by the President of the section of first instance sitting with six jurors. The jurors deliberated with the President upon the guilt or innocence of the accused but the President alone pronounced sentence. There was no appeal of any kind from the judgment or sentence of the Court when sitting as a criminal court. The Parquet consisted of two magistrates, one French and one Spanish, who between them carried out the functions of the *Ministère Public*, the French magistrate performing such functions before the Court in 'correctional' cases, and the Spanish magistrate carrying them out before the section of the Court which exercised civil jurisdiction, before the *section d'accusation* and before the Court when it was sitting as a criminal court.

This very brief summary of the Mixed Court as instituted by the 1924 *Dahir* has been necessary because, without it, it would be impossible to understand the reforms which have now been introduced. The revision of the Tangier Statute in 1928¹ was accompanied by an Agreement signed by Great Britain, France, Spain and Italy which amended in some minor respects the 1924 *Dahir*.² These Agreements left the structure of the Court unaltered fundamentally, but increased the number of permanent judges (*membres titulaires*) to five—one Belgian, one British, one Spanish, one French and one Italian.

From its earliest days, however, the Mixed Court was the object of criticism, which emanated from the Legislative Assembly, the local Bar, and the local Chambers of

¹ *British Treaty Series*, No. 25 (1928).

² *Ibid.*, pp. 15–21.

Commerce, and was voiced in the local press. At the Paris Conference of 1928, the four Governments represented there (the United Kingdom, France, Spain and Italy) agreed that a revised scheme for the Mixed Court should be worked out, and in 1928 a Committee composed of representatives of France, the United Kingdom, Spain and Italy was set up to consider proposals for the reform of the Mixed Court in accordance with the recommendations of the 1928 Paris Conference.¹ This Committee met in Paris in the spring and autumn of 1929, and took as its working documents proposals prepared by the French representative and counter-proposals prepared by the Spanish representative.

The Committee drew up a draft *Dahir* which provided for:

- (1) 'une Commission Supérieure de Cassation', consisting of three judges each drawn from the Supreme Court of one of the countries signatories to the Act of Algeciras, and chosen by the four Governments which are signatories of the 1923 Convention;
- (2) a Court of Appeal with a resident magistrate as President, and four non-resident magistrates chosen from among the judiciary (*aux cadres de la magistrature*) of the United Kingdom, Spain, France, Italy, Portugal and the Netherlands;
- (3) a Mixed Court (Civil, Correctionnel, de Paix et de Simple Police) consisting of five resident magistrates of Belgian, British, Spanish, French and Italian nationality;
- (4) A Parquet consisting of two magistrates, a Procurator-General (French or Spanish), and a Deputy (Dutch or Portuguese).

The draft *Dahir* embodying these proposals was sent to the United Kingdom, French, Spanish and Italian Governments for examination, but agreement was not reached between them and the Committee which had met in 1929 did not meet again.

In June 1936 the Committee of Control in Tangier set up a legal working party (*comité des études*) to work out a scheme of reform of the Mixed Court based on the previous proposals. The Spanish Civil War and the European crisis of 1938 caused the work of this committee to be suspended and it was never resumed, though its proposals were taken into consideration by the Committee of Legal Experts in 1952. On 14 June 1940 Spanish forces entered and occupied the International Zone of Tangier on the pretext of preserving its neutrality. For the first four months of this occupation the Mixed Court continued to function normally, but on 4 November 1940 Tangier was 'incorporated' into the Spanish Zone, and the Mixed Court was replaced by a Court consisting solely of Spanish judges.²

The Anglo-French Agreement of 31 August 1945 for the re-establishment of the international administration of Tangier³ (which resulted from the Paris Conference of 1945) established a provisional régime for Tangier based on the Convention of 18 December 1923, as amended by the Agreement of 25 July 1928. In certain respects the 1945 Agreement modified the existing instruments, but it did not refer to Article 48 of the 1923 Convention, nor did it contain any provisions specifically relating to the Mixed Court. The absence of any reference to the Mixed Court in the 1945 Agreement was obviously due to the expectation that the provisional régime established by

¹ See paragraph V of Annex C of the 'Special Provisions' of 25 July 1928 annexed to the 1928 Protocol: *British Treaty Series*, No. 25 (1928), pp. 23-27.

² For details of the Spanish occupation of Tangier during the Second World War see Delore, loc. cit., pp. 140-5. For a description of the Spanish occupation from the Spanish point of view, see Del Castillo, loc. cit., pp. 173-4.

³ *British Treaty Series*, No. 24 (1946).

that Agreement would not last very long and, in particular, to the provision in Article 2 of the 1945 Agreement that shortly after the inception of the provisional régime a conference of the Powers parties to the Act of Algéiras would be held to draw up a new Convention. This conference, which was to take place 'as soon as possible and not later than six months from the establishment of the provisional régime', was, however, never held, and the general dissatisfaction which had been felt before the war about the Mixed Court arose again and began to take shape in various proposals and suggestions emanating from the countries participating in the re-established international régime.

During 1951 it became apparent that the 'provisional' régime established for Tangier in 1945 was likely both to become of a more permanent character and to require modification in certain important respects. It was then proposed that the administrative changes which were contemplated should be accompanied by the long overdue reform of the Mixed Court. In the summer of 1952 the Committee of Control, which was itself engaged in considering the administrative changes, agreed to set up a legal working party to which Spain, France, Italy, the United Kingdom, the Netherlands, Belgium and Portugal were invited and agreed to send representatives. This 'Committee of Legal Experts' sat in Tangier from the middle of August to the end of September and, after submitting its recommendations to the Committee of Control, drew up a draft *Dahir* on the basis of these recommendations.

The principal recommendations which were made by the Committee of Legal Experts and embodied in the draft *Dahir* which they drew up related to the following matters:

(i) *Increase in the number of judges*

The population of Tangier, which in 1923 had been about 12,000, had by 1951 increased to about 20,000, and this growth in the population, combined with the ever-increasing importance of Tangier as a centre of commercial activities, had inevitably led to a large increase in the work of the Court. Statistics which were before the Committee of Legal Experts very clearly demonstrated the enormous increase in the number of cases before the Court which had taken place during the lifetime of the Court.¹ The five judges were considerably overworked, and the Court as organized in 1923 was not properly adapted to the work it was called upon to perform in 1952.² The Governments represented on the Committee of Control were unanimous in considering that the number of judges should be increased.

The Committee of Legal Experts made a recommendation, which was adopted, that the 'international jurisdiction' in Tangier should consist of eleven judges and two Procureurs, and that four of the judges should be assigned to a Court of Appeal, whilst the other seven judges should form a Court of First Instance which would consist of 'un Tribunal de Première Instance Civil et Correctionnel', 'un Tribunal Criminel' and 'un Tribunal de Paix et de Simple Police'. In making these recommendations the Committee of Legal Experts took into account not only the considerations outlined above, but also two additional factors which made necessary the appointment of more judges.

¹ In 1926 the number of cases before the section of first instance in its civil capacity was 164; in 1951 the number was 1,142. The 'Section de Première Instance Correctionnelle' dealt with 130 cases in 1926, and with 1,866 cases in 1952. The Appeals Section of the Court of First Instance dealt with 15 cases in 1926, and 361 in 1951.

² Even in 1928 it was recommended that the Mixed Court should be served by 13 'magistrates'—8 resident in Tangier (5 judges and 3 Procureurs) and 5 non-resident judges. In 1937 the Legal Working Party recommended that there should be nine judges.

These two factors were the abolition of lay assessors, which the Committee strongly recommended, and the creation of a 'Court of Appeal' separate from the other section of the Court, but on which judges resident in Tangier should sit.

The Committee recommended that the judges of the Mixed Court should continue to be selected on the basis of nationality, and that they should be nominated and appointed as provided in the 1924 *Dahir*. The Legal Experts did not, however, consider it to be within their competence to decide upon the nationality of all the additional judges whose appointment was recommended. This was left to the Committee of Control to decide, and it was finally agreed to maintain the principle that each judge should be a national of one of the Algeciras Powers and that there should be two Spanish judges, two French judges, a Belgian judge, a British judge, a United States judge, an Italian judge, a Moroccan judge, a Netherlands judge, a Portuguese judge and a Swedish judge.

The appointment of two Spanish and two French judges—a possibility mentioned in the 'Special Proposals' of 1928—can be justified on the following grounds:

- (a) the majority of cases coming before the Mixed Court involve either Spanish or French nationals;
- (b) the legal system of Tangier (as has already been seen) is based on the French system; and the Codes applied in Tangier are based on the French and Spanish Codes.

The appointment of a Moroccan judge is an innovation, but it was considered to be justified on the ground that the Mixed Court (under the annex to the Shereefian *Dahir* of 16 February 1924 as amended on 26 December 1928) has a limited jurisdiction over Moroccan subjects, and that such an appointment would be consistent with the legitimate aspirations of the Moorish population of Tangier to a greater share in the administration of justice in the International Zone. Further, the appointment of a Moroccan judge familiar with European systems of law, which would have been impossible in 1928, is now a practical proposition.

The appointment of a United States judge is, at first sight, somewhat surprising as the United States was not a party to the 1923 Convention and, alone of the Algeciras Powers, still enjoys capitulatory rights in the International Zone, with, of course, a Consular Court having jurisdiction over United States citizens in Tangier. It may be that the possibility of a United States judge on the Mixed Court foreshadows the removal of this anomaly. It is, at least, consistent with the participation of the United States in the administration of Tangier, which was made possible by Article 3 of the 1945 Agreement.

(ii) *Abolition of lay assessors*

The Committee of Legal Experts unanimously recommended the abolition of lay assessors, a reform which had been strongly advocated both in 1928 and in 1936. After considering what evidence there was in support of retaining this lay element on the Court, the Committee reached the conclusion that, more often than not, the lay assessors impeded the efficient working of the Court and were in general of very little use. It was suggested that in certain civil cases of a commercial nature the presence of a lay assessor might be of advantage, but it was generally felt that, in this respect, a lay assessor served a purpose which an expert witness could equally well fulfil. In general, the lay assessors were considered to be an anachronism unjustified by present-day conditions in Tangier, and the recommendation of the Committee for their abolition was upheld by the Committee of Control.

(iii) *Reform of the jury system*

Under both the 1924 *Dahir* and the 1952 *Dahir* which has replaced it, the jury forms part of the *tribunal criminel*. Some reform of the jury was, however, unanimously agreed to be desirable since the existing position, in which it was possible for six jurors to be of the same nationality as the accused, carried with it the danger of lack of impartiality. One member of the Committee of Legal Experts was originally in favour of total abolition of the jury on the ground that in a city as small as Tangier it could not be guaranteed that any jury, however constituted, would be entirely unprejudiced, but this view was rejected by the majority of the Committee, which was inclined to consider that to abolish both the lay assessors and the jury at one time would be too sweeping a reform. The suggestion put forward in 1936 of a single jury list consisting of nationals of all the Algeciras Powers was not adopted in its entirety,¹ and the Committee finally unanimously recommended that there should not be more than three jurors of the same nationality as the accused and that the jurors of other nationalities should be drawn from a common list.² The adoption of this recommendation, added to the fact that the jury (unlike the jury in British systems of law) deliberate with the judge, seems sufficient to ensure an impartial trial. It has also now been provided that a person in the employment of the International Administration of any Power party to the Tangier Convention shall be ineligible as a juror.

(iv) *Reform of the Parquet*

The thorny subject of a closer connexion between the Parquet and the Administration was debated at length by the Committee of Legal Experts. Proposals were put forward for supervision of the Parquet by the Assistant Administrator of Judicial Affairs if it was agreed to re-establish this appointment, but they were found to be objectionable by some members of the Legal Committee and, later, by some of the members of the Committee of Control. The inherent difficulty is that the international organization of Tangier is not such as to permit the general supervision of the Parquet, which in most continental legal systems is exercised by the Ministry of Justice. A not unreasonable fear that too much administrative interference with the Parquet would lead to pressure on the judiciary by the executive was undoubtedly at the back of the resistance to any form of control, however light, of the Parquet by the Administration. The final compromise reached and adopted is to allow the Assistant Administrator for Judicial Affairs, acting in the name of the Administrator, to ask the Chef du Parquet for information and to address 'recommendations' to him if necessary. The two Procureurs must take account of such 'recommendations' in their 'requisitions', but can express freely their own views on the subject-matter of the 'recommendations'. The Chef du Parquet is not, as suggested in 1936, an additional post held by a national of a 'neutral' power, but is to be an appointment held in turn by each of the Procureurs.

The Legal Committee unanimously recommended the abolition of the allocation of work between the two Procureurs, as provided in the 1924 *Dahir*, which was liable to lead to one Procureur having far too much work and the other too little.

(v) *Court of Appeal*

The Committee of Legal Experts unanimously recommended that there should be a

¹ The Legislative Assembly in 1947 also recommended that jurors should be drawn from the community in general.

² The proposal finally adopted is near to the solution adopted in the Mixed Courts in Egypt (see Article IV of Ch. I of the *Règlement d'Organisation Judiciaire pour les Procès Mixtes en Égypte* (*State Papers*, vol. 66, p. 598)).

Court of Appeal entirely separate from the other Sections of the Court.¹ The Committee first of all considered a proposal that there should be an Appeal Court of three members in which each of the judges of the Mixed Court would sit for a period of three years, being replaced at the end of this period by three other judges. This proposal, which was deemed to be consistent with the principle contained in the 1924 *Dahir* that all the judges of the Mixed Court are *pares inter pares*, was objected to on the ground that it would not secure the necessary continuity in the practice and 'jurisprudence' of the Court of Appeal. Instead, therefore, a proposal was put forward for an Appeal Court in which there should be two 'permanent' members, one French and one Spanish, with a 'non-permanent' member of another nationality. The Legal Committee finally agreed to recommend a compromise, namely, that the Court of Appeal should consist of four judges, two of whom—of French and Spanish nationality respectively—should be permanent, and two of whom should be non-permanent members drawn from the other nationalities represented on the Court. Each of them should sit for a period of four years. The Court of Appeal, it was recommended, should always sit with three judges, and its decisions should be taken by a majority. To avoid any possibility of three out of the four judges having a monopoly of the work of the Court of Appeal it was recommended that the work of the Court of Appeal should be evenly allocated between all four judges. The presidency of the Court would be held, in rotation, by each of the judges for a period of one year each. The Court would hear appeals in civil, commercial and 'correctional' cases, and, on points of law only, in criminal cases.

(vi) *The Greffe*

The Registry and Office of the Court—the *Greffe*—had been subject to a considerable amount of criticism, and recommendations to secure its greater efficiency were made. These included an increase in the number of staff, particularly amongst the higher appointments,² and a more clearly defined division between the various branches of the *Greffe*. It was also recommended that the Assistant Administrator for Judicial Affairs should be able to ask the General Assembly of Magistrates for information about the *Greffe*, and if necessary address to the Assembly 'recommendations' on the subject of the *Greffe*. In addition, specific supervision of the Notariat by the Parquet was recommended.

The Committee of Legal Experts, after sitting for three weeks, reported to the Committee of Control on the subjects which had been included in its terms of reference, and on certain other matters (e.g. the organization of the local Bar) which had been brought to the Committee's attention. In general, the Committee of Control approved the recommendations of the Legal Committee and charged the latter with the task of drawing up a draft *Dahir* embodying those of its recommendations which had been so approved. In addition, the Legal Committee were asked to make any necessary amendments, i.e. those which would be consequential on the adoption of the new *Dahir*, to the Code of Criminal Procedure and the Code of Civil Procedure.

At the end of September 1952 the Committee of Legal Experts produced a draft *Dahir* embodying, *inter alia*, the recommendations which have been summarized above. This draft *Dahir*, after certain amendments of a relatively minor nature, was approved by the Committee of Control. Its provisions were embodied in the Agreement signed

¹ This had been recommended both in 1928 and in 1936, and by the Legislative Assembly in 1947.

² The number of *Secrétaires-Greffiers* should, it was recommended, be increased to six instead of the four provided for in 1928, and provision was also made for assistant *Secrétaires-Greffiers adjoints*.

on 10 November 1952, and on 10 June 1953 the *Dahir* itself was signed by the Sultan. The new *Dahir* is not a supplement to the 1924 *Dahir* but replaces it. The changes which it makes are, in certain respects, fundamental ones, and the structure of the Court as it previously existed has been considerably altered. In some respects the reforms which it embodies are less fundamental than those contemplated in 1928, either in the recommendations contained in the 1928 'Special Provisions' or in the draft *Dahir* drawn up by the 1928 Legal Committee.

The recommendation that there should be a court of appeal wholly separate from the other courts has been adopted, but the proposal that the judges sitting on this court should be 'non-resident appeal judges who shall come periodically to hear appeals at Tangier', which is embodied in the 1928 draft *Dahir*, has not been followed, since the new *Dahir* provides that the judges of the Court of Appeal shall be judges *affectés au siège*, all of whom must be resident in Tangier. Furthermore, the suggestion that 'provision might be made for a court of cassation composed of magistrates belonging to the Supreme Court of a country not represented in the international tribunal of Tangier'—a suggestion which was adopted by the 1928 Legal Committee—has not been adopted. A court of cassation, in the opinion of many, would make the judicial system of Tangier top-heavy. Provision has, however, been made for appeals, on points of law and procedure, from the criminal section of the Mixed Court.

The provisions concerning the Parquet in the new *Dahir* in some respects go less far and in some respects farther than was contemplated in 1928. Although there is to be a Chef du Parquet, this does not involve the appointment of an additional *magistrat*. On the other hand, the rigid distinction between the functions of the two Procureurs which, in practice, prevented one Procureur from relieving the other, has been abolished, a reform which goes much farther than the yearly rotation of duties between the Spanish Procureur and the French Procureur, which was contemplated in the 1928 'Special Provisions'.

The desire expressed by the Spanish and French Governments to be represented by a magistrate of their own nationality in the Court of first instance and in the Court of Appeal, which was referred to in the 1928 Special Provisions, has been fully recognized by the provisions in the new *Dahir* for the appointment of permanent French and Spanish judges in the Court of Appeal, and by the provision that the judges of the Mixed Court shall include two French and two Spanish judges. The recommendation in the 1928 'Special Provisions' that the lay assessors of the Mixed Court shall be abolished—a recommendation which was heavily endorsed both in 1928 and 1936—was adopted. Two recommendations contained in the 1928 'Special Provisions' which have not been followed up are the creation of a presidency of the Mixed Court, and the setting up of a Vacation Court. The Court continues, as was its former practice, to be represented, e.g. in its relations with the Tangier Administration, by a 'Delegate' instead of by a permanent or semi-permanent President. Although there was some support, during the discussions of the 1952 Legal Committee, for the setting up of a Vacation Court, this proposal was dropped because the idea was considered to be impracticable having regard to the structure of the Court and the number of judges.

It is yet too early to form an opinion as to how effective the reforms now introduced are likely to be. The most that can be said at present is that reform of the Mixed Court, which had been mooted since 1928, has now become a fact, and that all the countries represented on the Committee of Control in Tangier have succeeded in agreeing upon measures which are intended to improve the administration of justice in the International Zone of Tangier.

J. A. C. GUTTERIDGE

THE COURTS OF SINGAPORE UNDER THE JAPANESE OCCUPATION

'Singapore was surrendered on 15th February, 1942, and the Japanese entered into military occupation on the morning of 16th February, 1942. The sessions of the Supreme Court were then continuing and sittings had been held up to that time. None of the Judges of this Court had left the country and sufficient judges were resident in this building to constitute a full court. They were that day removed at the point of the rifle, and later interned.'

The above quotation from the 'Grounds of Judgment' of Mr. Justice Evans, sitting in the Court of Appeal of Singapore, in the case of *Abubakar and Others v. Sultan of Johore*,¹ recounts the crucial facts of the impact of Japanese occupation on the courts of Singapore. The purpose of the present Note is to examine the legality of this and later acts of the Japanese occupation authorities, in the light especially of Article 43 of the Hague Regulations of 1907 which provides that

'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'

From this provision is deduced the duty of the occupant to maintain so far as possible the courts, their judges and their procedure, in the occupied State.

In May 1942 the Occupant set up a court known as the Syonan Kotohoin (Singapore High Court). Among the judges who were appointed to this Court were Raja Musa bin Raja Haji Bot, who had some time previously been a judge of the Supreme Court of the Federated Malay States and subsequently Professor of Law at Raffles College, Singapore, and, about a year later, Mr. Murugaso Velu Pillai, formerly an Advocate and Solicitor of the Straits Settlements and of Johore. According to the account later given by Mr. C. F. J. Ess, former Deputy Registrar of the Supreme Court, Singapore, the practice and procedure of the Syonan Kotohoin was identical with the practice and procedure of the former Supreme Court of the Straits Settlements, both in civil and in criminal matters, except that (i) before an accused or an appellant could be acquitted the Japanese criminal judge had to be consulted, a few amendments were made to the criminal law under which some new offences were created and some punishments for old offences varied; and (ii) the former heading of all proceedings in the courts was changed from 'In the Supreme Court of the Straits Settlements, Settlement of Singapore', to 'In the Syonan Kotohoin, Syonan'. Apart from those slight amendments the criminal law was unaltered. Civil law and civil procedure were left otherwise completely unaltered in so far as they affected British subjects, save that in a case in which one or both of the parties were Japanese, the Japanese Judge was the only judge who had jurisdiction to try the case. In such a case the Japanese Judge would adopt the Japanese procedure and the Japanese civil law.²

According to another version, however, the changes, at least in form, went farther than that. The name of the Court was changed in a 'proclamation of annexation', and

¹ *Malayan Law Journal*, 16 (1950), p. 3. For the proceedings in the High Court of Singapore see *ibid.* 15 (1949), p. 187, and in the [Judicial] Committee of the Privy Council see *Sultan of Johore v. Abubakar, Tunku Aris Bendahara and Others*, [1952] A.C. 318. The Grounds of Judgment are also set out at pp. 108-29 of the 'Record of Proceedings' in the Judicial Committee of the Privy Council (hereinafter in these footnotes referred to as *Record*), where the passage above quoted appears at p. 121.

² See the Affidavit of Mr. Ess set out in the *Record*, pp. 38-39.

in the writs issued thereafter the name of the King of England was struck out and 'Dai Nippon Teikoku' (Greater Japanese Empire) substituted. The writs were witnessed not by the Chief Justice of Singapore, but by a Judge of the Syonan Kotohoin.¹

With regard to the law applied by the Japanese Court, it appears that 'certain Ordinances have been passed whereby the old laws have been modified to a certain extent to suit the present conditions. . . . While in the past the different States of Malaya were governed by their respective laws in conjunction with the Colony which had its own laws, to-day the military Administration treats the whole of Malaya as one whole. . . .'²

On 3 May 2605 (that is, 1945) the Sultan of Johore issued a summons³ in the 'Court of the Judge at Syonan' claiming certain relief, and on 18 June in the same year Mr. M. V. Pillai gave judgment in his favour.⁴ In 1945, the British Courts were restored, and on 14 April 1947 interested parties applied to the High Court of the Colony of Singapore for an order setting aside the Decree of the Japanese Court. Thereafter, the Judges of the British courts had occasion to review what the Japanese Occupant had done in regard to the Courts of Singapore. Evans J., for example, said:

'As a power in military occupation of territory it was at international law the duty of the Japanese to give the inhabitants access to the courts they were accustomed to. The law administered and the procedure should continue without alteration. The cases of the courts of Alsace in 1870 and of the Belgian courts in 1914/18 illustrate the nature of these obligations. The Articles of war are to the same effect. It is said the occupying power was entitled to intern judges and others, and that "all legitimate steps he takes in the exercise of this right must be recognized by the legitimate government after the occupation has ceased"'.⁵

'It may be that the occupying power has such rights and that its legitimate acts must be recognised. There is here, however, no evidence at all that the Japanese occupation was conducted in accordance with the conditions prescribed, and none of the necessity to remove judges. Moreover, even supposing these facts could be proved, such courts established by necessity are not the courts of the occupied country but those of the occupying power.'⁶

He cited in support of the last conclusion the fact that 'a proclamation of annexation was issued', and indeed Murray-Aynsley, Chief Justice of Singapore, said:

'During the period of their occupation the Japanese purported to annex the Settlement of Singapore and treated it as Japanese territory. They established a court which took the place of the existing Supreme Court but it was a Japanese Court and the proceedings were in the name of the Emperor of Japan. None of the previous Judges functioned. The Japanese appointed a Japanese Judge and several others.'⁷

There is probably some confusion in this statement. Occupation is something very different from, and falls short of, annexation of territory. If what the Japanese effected was annexation, then it is no ground of complaint that the occupation was not 'conducted in accordance with the conditions prescribed'. But, in fact, whatever the Japanese Proclamation may have said, it is an open question whether they can legally have annexed Singapore. That they conquered the territory is a matter of historical

¹ See Grounds of Judgment of Evans J., *Record*, p. 122; and see *infra*, p. 509. Examples of summonses and other process in the Japanese Court are to be found set out in the *Record*. They are headed 'In the Court of the Judge at Syonan' (that is, Singapore) and dated according to the Japanese calendar.

² See Grounds of Judgment of M. V. Pillai, *Record*, p. 147.

³ *Ibid.*, p. 134.

⁴ *Ibid.*, pp. 143-7 and 148.

⁵ The learned Judge here cited Oppenheim, *International Law*, vol. ii (6th ed. by Lauterpacht, 1944), § 169.

⁶ *Record*, p. 121.

⁷ *Ibid.*, pp. 78-79.

fact. According to Oppenheim,¹ conquest of the *whole* of enemy territory is necessary for subjugation, which 'takes place only when a belligerent, after having annihilated the forces and conquered the territory of his adversary, destroys his existence by annexing the conquered territory. Subjugation may . . . be . . . defined as extermination in war of one belligerent by another through annexation of the former's territory after conquest, the enemy forces having been annihilated.'² Moreover, 'complete conquest, together with annihilation of the enemy forces, brings the armed contention, and thereby the war, actually to an end . . .'.³ But in 1942 and 1943 the war was not at an end. Armed contention between Japanese forces and those of the British, the sovereign power *quoad* Singapore, continued and resulted, as we know, in the dislodgement in 1945 of the Japanese from Singapore. It is therefore at least arguable that Singapore was not legally annexed, that what there obtained from February 1942 to September 1945 was belligerent occupation, and that the Hague Regulations applied in the ordinary way. That much was indeed accepted by Sir H. C. Willan, Chief Justice of the Federation of Malaya, who in his 'Grounds of Judgment' said:

'Japan, as a signatory assenting to the International Convention concerning the Laws and Customs of War on Land, 1907, and the Regulations thereunder . . . bound herself to respect private property, and her Custodian in Singapore should have acted in accordance with that Convention.'⁴

Some further analysis of the remarks of Evans J. above quoted may be of interest. In saying that it was 'at international law the duty of the Japanese to give the inhabitants access to the courts they were accustomed to', the learned Judge was presumably referring to 'the British and American interpretation of Article 23 (*h*) of the Hague Regulations',⁵ by which it is forbidden 'To declare abolished, suspended or inadmissible, in a Court of law the rights and actions of the nationals of the hostile party', viz. that the nationals of the hostile party include *par excellence* the inhabitants of the occupied territory. Whether even on this interpretation the Occupant is bound to give the inhabitants access to 'the courts they were accustomed to' is by no means clear. 'There is no doubt', says Oppenheim, 'that an occupant may suspend the judges as well as other officials', but 'he must temporarily appoint others in their place.'⁶ As will be seen, the Japanese did a great deal more than suspend the Judges of the Courts of Singapore. Moreover, they went further and issued writs and carried on proceedings in the name of the Emperor of Japan instead of that of the King of England.⁷ This, it is submitted, is perhaps going too far. The occupant has 'no right to constrain the courts to pronounce their verdicts in his name, although he need not allow them to pronounce verdicts in the name of the legitimate Government'.⁸ If the pronouncement of verdicts and judgments in the name of the occupant is illegal, then the issue of writs and the carrying on of proceedings in his name must likewise be illegal, and it may be that the whole of the proceedings before the Japanese Court in the present case were tainted

¹ Op. cit., vol. ii (7th ed. by Lauterpacht, 1952), p. 600.

² Ibid.

³ Ibid.

⁴ Record, p. 105.

⁵ Oppenheim, op. cit., p. 445; see also p. 310.

⁶ Op. cit., p. 447. Cf. Wheaton, *Elements of International Law*, vol. ii (7th ed. by Keith, 1944), p. 236: 'If owing to the state of occupation and the special circumstances arising therefrom [the Occupant] finds certain judicial and administrative modifications indispensable, he must see to it that they are not incompatible with the rules of international law and the dictates of humanity and justice.' Cf. also the strike, mentioned *ad loc.*, on 12 December 1942 of 'over 1,000 Belgian magistrates against the creation by the German authorities of a Greater Antwerp administrative district, which was illegal. This led to a German withdrawal. B.I.N. xx. 24.'

⁷ See *supra*, p. 508.

⁸ Oppenheim, op. cit., p. 447. Cf. *P. v. S.*, decided by the Court of Appeal of Batavia: (*Indonesisch*) *Tijdschrift van het Recht*, 1947, pp. 327, 335; *Annual Digest*, 1947, Case No. 118.

with illegality. That point was not, however, taken before or decided by any of the Courts who later reviewed these proceedings. Those Courts were chiefly concerned to establish whether or not the proceedings commenced in 1949 were a continuation of the 1945 proceedings and whether they were in the same Court.¹ Thus, at first instance, Gordon Smith J. said:

'In the first place, although Originating Summons 24 of 2605, i.e. 1945, is headed "In the Court of the Judge at Syonan" yet it is entitled "In the matter of Order 52 Rule 5 of The Rules of the Supreme Court, 1934".'

'Although the Japanese may have called the Court by a slightly different name, there is no evidence or information before me that they passed any amending legislation whatsoever either altering the name of the previous High Court or making any alteration in its constitution, jurisdiction or powers or its procedure and I understand that such Court, certainly in its Civil jurisdiction, carried on exactly the same as prior to the surrender, with many of the same personnel employed as previously. The Judge who gave the decision was previously a practising advocate of the Colony and was appointed to be a Judge by the Japanese and similar appointments had been made prior to the surrender and have been made since the re-occupation. In my opinion, the High Court continued to function as formerly during the occupation and it is exactly the same High Court that is continuing to function today.'²

And in the Court of Appeal, Willan C.J. observed:

'In Hall's *International Law*, 6th edition, page 471

"It has been seen that the authority of the local civil and judicial administration is suspended as of course as soon as occupation takes place."

'The Japanese Military Authorities interned all the Judges of the Supreme Court of the Straits Settlements and replaced them by their own appointees. But, admitting all the facts stated by Gordon Smith J. in his judgment, the High Court which functioned in Singapore during the Japanese Occupation was the Court of the Occupying Power—i.e. a Japanese Court, which functioned under the will of that Occupying Power, and, in my opinion, it is not the same Court as the High Court of the Colony of Singapore.'³

The two other Judges, Murray-Aynsley C.J. and Evans J., as has been seen,⁴ similarly treated the Court of Mr. Pillai (the Syonan Kotohoin) which replaced the Supreme Court of the Straits Settlement, as a Japanese Court, but not as an illegal one, nor its judgments as without force. Indeed, the Occupant has, under Article 43 of the Hague Regulations, the right to set up his own courts. In 1918, when the Belgian courts suspended their sittings in consequence of the deportation of some of the judges, German courts were set up in their place.⁵ In 1942 in Burma, the Commander-in-Chief of the Nippon Imperial Army established courts and provided for and conducted judicial administration in Burma. The courts which administered criminal justice in Burma during the Japanese occupation were courts constituted under the pre-existing Code of Criminal Procedure; the presiding judges and magistrates were for the most part the same judicial officers who presided over these courts under the British administration; and the penal laws were the same.⁶ In the case of the civil courts, the

¹ For the purpose of the Japanese Judgments and Civil Proceedings Ordinance, 1946 (Singapore Ordinance No. 37 of 1946), which purported 'to make provision . . . for the carrying on of proceedings instituted in' Japanese courts during the period of occupation. See *Record*, pp. 50-51.

³ *Ibid.*, pp. 84-85.

² *Ibid.*, p. 50.

⁴ *Supra*, p. 508.

⁵ See Garner, *International Law and the World War* (1920), vol. ii, §§ 377-8, cited in Oppenheim, *op. cit.*, p. 448.

⁶ See *The King v. Maung Hmin et Al.*, decided by the Burmese High Court of Judicature: [1946] Rangoon L.R. 1; *Annual Digest*, 1946, Case No. 139.

two High Court Judges whose services were available after the British evacuation of Burma became Judges of the High Court established by the Occupying Power.¹ But what the Japanese did in Singapore in 1942 differed from what was done in all these instances. Immediately on occupying the place they removed all the British Judges whom they found sitting in the courts, without giving them an opportunity to show whether they would respect and serve the new military government.

It is submitted that to this further extent the courts set up by the Japanese in Singapore were from the point of view of international law of questionable legality. There remains yet one other aspect to be considered. The courts set up by an occupant must administer the law of the country.² Mr. Pillai, in his 'Grounds of Judgment', does not seem to be quite sure whether the Japanese Court followed that rule or not. 'Properties situated in Singapore', he proclaims, 'must be dealt with according to English law'—this is of course the normal rule of private international law as to supremacy of the *lex situs* where land is concerned. But he admits that 'certain Ordinances have been passed whereby the old laws have been modified to a certain extent to suit the present conditions'.³ In particular, the Military Administration treated the whole of Malaya 'as one whole' instead of as a number of States *plus* the Colony of Singapore each governed by its own laws. By a process of reasoning which is difficult to follow, Mr. Pillai concluded by applying Mohammedan law to the case before him.⁴

Mr. Ess, sometime Registrar of the Japanese High Court, however, states in his affidavit:⁵ 'Civil law and civil procedure was left completely unaltered in so far as it affected British subjects. . . .' But Murray-Aynsley C.J. said:

'The old procedure was followed and in some cases also the existing law. In the proceedings under review the existing law of the Straits Settlements was deliberately not applied.'⁶

This agrees more nearly with Mr. Pillai's remarks. If this represents what in fact did happen, it would be a still further ground for impeaching the validity of the proceedings of the Japanese Court.

The Originating Summons which began the case which provides the subject of this Note asked for an order setting aside the Japanese decree on the grounds, *inter alia*, that 'it was based on principles unknown to the existing laws of the Colony'.⁷ On the other hand, the proceedings which led ultimately to the Privy Council hearing were interlocutory, comprising a plea on the part of the Sultan of Johore to the jurisdiction of the Court of Singapore, on the ground of sovereign immunity. Gordon Smith J., at first instance, expressly disclaimed any concern with the merits or otherwise of the Japanese judgment,⁸ and the Judges of Appeal do not mention those merits. However, Willan C.J. points out that the Japanese Judgments and Civil Proceedings Ordinance, 1946, 'nowhere lays down that proceedings in, and decrees of, Japanese Courts are valid or invalid',⁹ although some of the terms of the Ordinance imply that claims of invalidity might be made. Thus Section 3 (3) provides that:

'No Japanese decree shall be set aside on the ground that the person or persons constituting the court whose decree is in question was or were not appointed in accordance with the provisions of, or did not possess the qualifications specified in, the existing laws';

¹ See *Abdul Aziz v. The Sooratee Bara Bazaar Co., Ltd.*, decided in 1946 by the Burmese High Court: [1947] Rangoon L.R. 18; *Annual Digest*, 1946, Case No. 140.

² See Oppenheim, *op. cit.*, p. 448.

³ See *supra*, p. 508.

⁵ *Ibid.*, p. 39.

⁷ *Ibid.*

⁹ *Ibid.*, p. 101. See also the extract from the Proclamation made and published in Kandy, but to take effect in Singapore, by Lord Mountbatten on 15 August 1945 (*ibid.*, p. 122).

⁴ *Record*, p. 147.

⁶ *Ibid.*, p. 79.

⁸ *Ibid.*, p. 41.

but according to Section 4 (a) a Japanese decree might be set aside if 'it was obtained as the result of . . . force or threat of force, injury or detriment to any party to the proceedings or other persons . . .', or '(c) that it was based on principles unknown to the existing laws'.¹ The Privy Council said of the Ordinance that it

'does not treat Japanese Decrees as of no effect. Neither does it treat them as conclusive. It provides for their review, with the result that they might either be confirmed or modified or reversed. . . .'²

It is submitted that an opportunity was missed to protest in, or at the time of the making of, the Ordinance of 1946 against the illegalities in the setting up and conduct of the Japanese courts in Singapore, or at least to place on record that there were such illegalities.³ It is appreciated that in 1946, shortly after the re-establishment of normal conditions in Singapore, there may have been a paucity of evidence as to exactly what had occurred during the occupation. Moreover, to have declared the Japanese courts and their decrees illegal might have created difficulties with regard to fair and reasonable judgments given in suits heard in those courts. At the same time, the non-committal language of the Ordinance gives it the appearance of acquiescence in the acts of the Japanese Military Administration in driving out the English Judges, in conducting legal proceedings in the name of the Occupant instead of that of the displaced Sovereign, and in failing to administer uniformly the law of the occupied territory.

A. B. LYONS

IN Volume 26 of this *Year Book* (1949), at pp. 427-33, there is a Note on the decision of the Exchequer Court of Canada (New Brunswick Admiralty District) in the case of *Estonian State Cargo and Passenger Steamship Line v. Proceeds of the Steamship 'Elise' and Messrs. Laane and Baltser (Intervenors)*. It should now be noted that an appeal from this decision has been upheld by the Supreme Court of Canada and is reported in [1949] Supreme Court Reports, 530. The main points in the decision of the Supreme Court are that the Decree of the Estonian Soviet Socialistic Republic of 8 October 1940, which purported to nationalize all Estonian merchant ships, including those in foreign ports, and fixed the compensation therefor at 25 per cent. of each ship's value, was penal and confiscatory; and that, even if in terms it applied to the *Elise*, which was absent from Estonia at the time of the Decree and had been absent ever since, the Decree, in accordance with the principles of conflicts of law as understood in British courts, could not be enforced; in consequence, the ownership of the vessel was unaffected by the confiscatory legislation. The Supreme Court placed a considerable amount of reliance on the decisions of Atkinson J. and the English Court of Appeal in what is usually called the *Vapper* case (*A/S Tallinna Laevauhisus and Others v. Tallinna Shipping Co., Ltd., et Al.*), 79 Ll.L. Rep. 245 and 80 Ll.L. Rep. 99. Accordingly, the appellants, an Estonian partnership which owned the vessel before the Decree purporting to nationalize it, were entitled to receive the proceeds of the sale of the ship after payment of a claim for wages and certain other claims.

A. B. C.

¹ *Record*, p. 101. See also [1952] A.C. at p. 337.

² [1952] A.C. at p. 341.

³ As to protest see Oppenheim, *op. cit.*, pp. 789-90; and as to the duty of States to protest see Waldock in this *Year Book*, 28 (1951), pp. 160, 162 and 166. See also MacGibbon, *supra*, pp. 293-319.

DECISIONS OF ENGLISH COURTS DURING 1952-3 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

A. PUBLIC INTERNATIONAL LAW

Jurisdiction over Crimes Committed Abroad—British Subjects—Suez Canal Zone.

Case No. 1. *R. v. Page*, [1953] 2 All E.R. 1355. The appellant, an acting corporal in the Royal Corps of Signals, was convicted by a general court-martial assembled at Fayid in the Suez Canal Zone of the murder of an Egyptian national in an Egyptian village. He was sentenced to death, but the sentence was commuted by the confirming officer to one of imprisonment. The prisoner then appealed to the Courts-Martial Appeal Court on the ground that the victim was not a person within the Queen's peace. This argument was based on a passage in Coke's Third Institute, c. 7, at p. 47, where it is stated:

'Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature . . . under the King's peace with malice aforethought.'

It was contended that a court-martial could only try a case of murder if it came within the common law definition of the crime, and could not try one in which recourse had to be made to statutory provisions which had made murder committed abroad triable in England.

It was *held* by the Courts-Martial Appeal Court (Lord Goddard C.J., Havers and Glyn-Jones JJ.) that the appeal must be dismissed. Under Section 41 of the Army Act it is provided (subject to certain provisions designed to ensure that persons charged with grave offences shall be tried when possible by a civil court rather than by a court-martial) that 'every person who, whilst he is subject to military law, shall commit any of the offences in this section mentioned shall be deemed to be guilty of an offence against military law, and if charged under this section with any such offence (in this Act referred to as a civil offence) shall be liable to be tried by court-martial'. Murder is one of the offences mentioned. According to the Court 'the plain meaning of the section is that a court-martial can try a person subject to military law for any offence, wherever committed, which would be an offence against the law of England, subject only to this, that the section provides for the trial of the prisoner before a civil court instead of court-martial' in certain circumstances. With regard to the particular case of murder, Section 9 of the Offences against the Person Act, 1861, provides that where any murder is committed by any subject of Her Majesty on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed is the subject of Her Majesty or not, the offence may be dealt with in all respects as if it had been committed in England. The Court therefore concluded that there was no doubt that the court-martial had jurisdiction to try the case. As for Coke's definition of murder, even that high authority appeared to have overlooked a statute of Henry VIII's reign (22 Hen. VIII, c. 23) which enabled persons charged with treason or murder to be tried in any country in whatsoever time or place within the King's dominions or without the offence was considered to be committed.

From the point of view of international law this matter was governed by the Anglo-Egyptian Convention of 26 August 1936,¹ which provides that members of the British Forces stationed in Egypt shall be not subject to the criminal jurisdiction of the Egyptian courts but shall be handed over to the British authorities. The effect of the Court's decision was to prevent the underlying intention of this provision from being frustrated,

¹ *Treaty Series*, No. 6 (1937), p. 23.

through some anomaly arising out of English law. It is also worth noting that the Courts-Martial Appeal Court disapproved certain passages in the *Manual of Military Law* (1951 ed., pp. 131-2) where it is stated that it must be proved in the case of murder that the victim was under the Queen's peace and that the Army carries the Queen's peace with it wherever it goes. 'So far', said the Court, 'as this may appear to assert that an alien who is not at the time of the crime within Her Majesty's dominions or territories is within her peace, we cannot assent to it, at least unless the territory has been effectively occupied by her forces.' The effect of the 1861 Act, as has been seen, is that the notion of the Queen's peace is not essential to a conviction for murder. But it is not easy to see what advantage there is in upsetting the other notion that the Army carries with it the Queen's peace wherever it goes and in drawing a distinction between cases of military occupation and other cases. British forces stationed in foreign territory under a treaty are as much about their lawful occasions as British forces in military occupation of enemy territory; and it is submitted that, wherever British forces are about their lawful occasions, they shall carry the Queen's peace with them—whatever be the significance which that notion still retains.

Nationality—Citizens of Eire—Residence in England.

Case No. 2. *Bicknell v. Brosnan*, [1953] 1 All. E.R. 1126. In May 1949 the respondent, a citizen of what is now the Republic of Ireland—he was born in 1931 in County Kerry, in the territory of what was then the Irish Free State—came to England as a labourer. Apart from one month's holiday in Ireland, he had ever since resided continuously in England. His usual place of residence was Bristol. On 26 September 1952 notice was served on him, under the National Service Act, 1948, requiring him to submit himself to examination by a medical board. He refused to do so on the ground that he was an Irish citizen. At a court of summary jurisdiction sitting at Bristol an information was preferred by the appellant (an officer of the Ministry of Labour and National Service) charging the respondent with an offence against the National Service Act in that, being a person subject to registration under the Act, he had failed to comply with the requirements of the notice served on him. The appellant contended that the respondent, whether he were a British subject or not, was a person subject to registration within the meaning of the National Service Act. The respondent argued: (i) that he was resident in Great Britain for a temporary purpose only; (ii) that he was not a British subject; and (iii) that, although under the British Nationality Act, 1948, and the Ireland Act, 1949, the position of Irish citizens had for certain purposes been assimilated to that of citizens of the United Kingdom and colonies, this was rather for the purpose of preventing Irish citizens from suffering the disabilities of aliens than of imposing on them the same obligations as those imposed upon citizens of the United Kingdom and colonies. The justices dismissed the information on the ground that the respondent was not a British subject.

On appeal by way of a case stated, it was *held* by the Queen's Bench Divisional Court (Lord Goddard C.J., Lynskey and Parker JJ.) that the appeal must be allowed. Section 1 (1) of the National Service Act, 1948, provides that every male British subject ordinarily resident in Great Britain between the ages of eighteen and twenty-six, subject to certain excepted classes not relevant to the case, shall be liable to be called on to serve in the armed forces of the Crown. The Divisional Court, while finding that the respondent was 'ordinarily resident' in Great Britain for the purposes of the Act, seems to have agreed with the view of the justices that he was not a British subject. For Section 1 (1) of the British Nationality Act, 1948, provides that

'Every person who under this Act is a citizen of the United Kingdom and colonies or who under any enactment for the time being in force in any country mentioned in sub-section (3) of this section is a citizen of that country shall by virtue of that citizenship have the status of a British subject';

and Ireland is *not* one of the countries mentioned in the sub-section concerned.

However, Section 3 (2) of the same Act provides that

'... any law in force in any part of the United Kingdom . . . at the date of the commencement of this Act (1 January 1949), whether by virtue of a rule of law or of an Act of Parliament or any other enactment or instrument whatsoever, and any law which by virtue of any Act of Parliament passed before that date comes into force . . . on or after that date, shall, until provision to the contrary is made by the authority having power to alter that law, continue to have effect in relation to citizens of Eire who are not British subjects in like manner as it has effect in relation to British subjects.'

The Divisional Court, apparently treating the case purely as one of construction of this provision, and not adverting to the international and constitutional issues which were discussed at least to some extent in *Murray v. Parkes*,¹ came to the conclusion that, for the purposes of the National Service Act, 1948, Irish citizens 'are to be treated . . . in exactly the same way as though they were British subjects'. There was the further point that, the National Service Act, 1948, being only a consolidating Act, 'if it was intended to exempt persons hitherto liable for service, as the citizens of Eire were at the time of its passing, one would expect to find that they were exempted by clear words'. The Ireland Act, 1949, did not affect the issue because Section 3 (1) (a) thereof enacted that the provisions of the British Nationality Act, 1948, were not to be affected by the fact that the Republic of Ireland was no longer part of Her Majesty's dominions. There is no disguising the fact that the position of Irish citizens in the United Kingdom is anomalous, but, subject to that, it is not unreasonable that the anomaly should extend to duties as well as to privileges. Moreover, it appears that no undue burden is placed upon Irish citizens because, as the Divisional Court pointed out, the effect of all these various provisions is that an Irish citizen is not regarded as being 'ordinarily resident' in Great Britain, and therefore as obliged to perform military service, if he has been resident in Great Britain for less than two years.

Trading with the Enemy—Effect of War upon Contracts—Contracts of Current Account.

Case No. 3. *Arab Bank, Ltd. v. Barclays Bank (Dominion, Colonial and Overseas)*, [1953] 2 All E.R. 263. The plaintiffs were a bank incorporated in Palestine in 1930. Their head office was in Jerusalem until 1 July 1948, but after that date it was in Amman, Jordan, where the plaintiffs became registered on 7 November 1949. The defendants were a company incorporated in England with branches overseas. In 1939 the plaintiffs, having made a declaration submitting themselves irrevocably to the courts of Jerusalem, opened a current account with the defendants' Jerusalem branch. On 14/15 May 1948, upon the termination of the British Mandate, war broke out between the newly formed State of Israel and the Arabs in Palestine, supported by the neighbouring Arab States. An armistice was concluded on 3 April 1949 but, technically, a state of war still existed. Between 14 May and 1 July 1948 the plaintiffs' offices were in that part of Jerusalem controlled by the Arabs. The defendants' Jerusalem office, however, was in territory controlled by Israel. On 19 May 1948 the State of Israel enacted a Law and Administration Ordinance (effective as from 14 May 1948) providing that the law which existed in Palestine on 14 May 1948 should remain in force, in so far as there was nothing therein repugnant to the Ordinance or to other laws which might be enacted by Israel. This law included the common law of England as regards trading with the enemy. Israel also enacted legislation on the same date making it illegal to make any payment to, or place any sum to the credit of, any person resident outside Israel. Later a Custodian of Absentee Property was appointed. 'Absentee' was defined as meaning any owner or beneficiary of property situate within the area to which the law of Israel applied who was on 29 November 1947, or at any time thereafter, in either the neighbouring Arab States or in the part of Palestine to which the law of Israel did not then apply and, in relation to companies, as meaning a company which was the lawful owner of property within the area to which

¹ [1942] 2 K.B. 123.

the law of Israel applied and if either at least one-half of its capital was at the disposition of an absentee or one-half of its members, partners, shareholders or directors were absentees. On 27 April 1950 His Majesty's Government in the United Kingdom recognized the State of Israel *de jure* with a reservation that no more than *de facto* recognition was accorded in respect of Israeli sovereignty over the part of Jerusalem occupied by Israel. In April 1951 His Majesty's Government in the United Kingdom accorded *de jure* recognition to the Hashemite Kingdom of Jordan (which included the part of Palestine occupied by the Arabs), with a similar reservation in respect of the part of Jerusalem occupied by Jordan. On 9 October 1950 the plaintiffs issued a writ in the English courts claiming against the defendants payment of the sum of £582,931, being the sterling equivalent at par of a like sum in Palestine pounds standing to the credit of the current account kept by the plaintiffs with the defendants' branch in Jerusalem. On 24 January 1951, however, the Israeli Custodian of Absentee Property requested this same branch to hand over the said sum to him, and on 8 February 1951 the defendants complied with his request. In the action which had been started in the English courts Parker J. dismissed the plaintiffs' claim on two grounds. These were: (i) that no demand was ever made on the defendants for the payment of the sum before 14 May 1948; and (ii) that, the plaintiffs' credit on current account with the defendants being a liquidated sum of money, the right to payment of it in Jerusalem was not wiped out by the outbreak of war but was merely suspended, so that there was no question of the plaintiffs having any right to recover the sum from the defendants' head office in London as money had and received or on the ground of unjust enrichment. The plaintiffs appealed against Parker J.'s decision on the second point.

It was *held* by the Court of Appeal (Singleton, Jenkins and Morris L.J.J.) that the appeal must be dismissed. The plaintiffs' case was as follows: (i) that the contract of current account between the plaintiffs and the defendants became, on the outbreak of war, subject to the law of Israel in regard to trading with the enemy; (ii) that Israeli law in this regard was the same as the common law of England; (iii) that under the common law of England 'a state of war between this kingdom and another country abrogates and puts an end to all executory contracts which for their further performance require . . . commercial intercourse between the one contracting party, subject of the King, and the other contracting party, an alien enemy, or anyone voluntarily residing in the enemy country';¹ (iv) that although, as a general rule, 'accrued rights are not affected though the right of suing in respect thereof is suspended';² the plaintiffs' right to payment on demand of the balance standing to the credit of their current account was not an accrued right in this sense, but was merely an incident of a wholly executory contract such as would involve intercourse between the defendants and the enemy plaintiffs and was therefore abrogated by the outbreak of war, the abrogation extending to the credit balance itself; and (v) that, in consequence, the defendants had been 'unjustly enriched'. No attempt seems to have been made to argue that the validity of the Israeli legislation was in any way affected by the fact that His Majesty's Government had granted no more than *de facto* recognition to Israel's sovereignty over that part of Jerusalem in which the defendants' office was situated. The plaintiffs' first three propositions were not disputed, but the fourth was not acceptable to the Court of Appeal. Morris L.J. referred to the general principle as laid down by Viscount Haldane in *Stevenson and Sons v. A.G. für Cartonnagen Industrie*, to the effect that 'The law of this country does not in general confiscate the property of an enemy. He cannot claim to receive it during war, but his right to his property is not extinguished; it is merely suspended.'³ The fact that the plaintiffs had made no demand for payment of the debt before the outbreak of war was not sufficient to take the case out of this rule. The plaintiffs' fourth proposition appeared to Jenkins L.J. 'to confound the further performance of the contract, which was clearly abrogated, with the indebtedness of the defendants to the plaintiffs on the current account which had in fact resulted from the

¹ *Per* Lord Dunedin in *Ertel Bieber and Co. v. Rio Tinto Co.*, [1918] A.C. 260, at p. 267.

² *Per* Lord Dunedin, *ibid.*, p. 269.

³ [1918] A.C. 239, at p. 247.

operation of the contract down to the outbreak of war, and did not depend for its existence on any further performance of the contract after such outbreak'. On this crucial issue there was no authority directly in point, but it is significant that all three Judges of the Court of Appeal in separate judgments expressly adopted a view put forward by Lord Thankerton in *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag*.¹ In that case Lord Thankerton said he was 'inclined to agree with Sir Arnold McNair's suggestion (*The Legal Effects of War*, 2nd ed. (1944), at p. 93) that the distinction between "executed" and "executory contracts" may be not very helpful in this connection, and that it may be safer to say that the effect of the outbreak of war upon contracts legally affected by it is to abrogate or destroy any subsisting right to further performance other than the right to the payment of a liquidated sum of money, which will be treated as a debt and will survive the outbreak of war'.

As it was agreed that there was no difference between Israeli and English law in the matter of trading with the enemy, this decision may be said to represent, in the first place, a useful clarification of the English common law in this regard. But that is not the whole extent of the importance of this case. While it may be true that international law leaves to the belligerent States concerned the regulation of intercourse with the enemy, there are clearly limitations to this principle, of which perhaps the most obvious concerns the extent to which the courts of neutral countries are obliged to recognize the trading with the enemy legislation of the belligerent States. This legislation must therefore conform ultimately to the principles of international law, and it may perhaps be taken as a recognition of that fact that the Court of Appeal should have relied so signally for guidance upon a writer who is an acknowledged expert in international law no less than in the common law.

Effects of War—Enemy Property—Confiscation of.

Case No. 4. *R. J. Reuter Co., Ltd. v. Ferd. Mulhens*, [1953] 2 All E.R. 1160. The plaintiffs, registered owners of certain trade marks relating to '4711' eau de Cologne and associated products, commenced proceedings against the defendant for infringement of their trade marks and for trade libel or slander through allegations to the effect that the plaintiffs' goods were not the original '4711' eau de Cologne products. The defendant challenged the right of the plaintiffs to sue as registered proprietors of the trade marks on the ground, *inter alia*, that the assignment of the marks by the Custodian of Enemy Property to the plaintiffs under a direction of the Board of Trade was in excess of any powers conferred on the Board by the Trading with the Enemy Act, 1939. The defendant argued that he was entitled to use the marks and counterclaimed for rectification of the register of trade marks and also to restrain the plaintiffs from using the marks. Danckwerts J. gave judgment for the plaintiffs on their claim for infringement of the trade marks, but dismissed their claim for trade libel or slander. He also dismissed the defendant's counterclaim. Both sides appealed.

It was held by the Court of Appeal (Sir Raymond Evershed M.R., Birkett and Romer L.JJ.) that both the appeal and the cross-appeal must be dismissed. In a lengthy judgment Sir Raymond Evershed traced the background of the case, the essential features of which were as follows. Before the outbreak of the Second World War the firm of Mulhens in Cologne, to which the defendant had succeeded, was exclusively associated in Germany and elsewhere with the '4711' brand of eau de Cologne. By an order dated 26 June 1940 the Board of Trade, under powers conferred by Section 7 (1) of the Trading with the Enemy Act, 1939, vested most of the shares of the plaintiffs (who had for some time been importing '4711' into England) in the Custodian of Enemy Property, as these were held by a Dutch subsidiary of Mulhens and the Netherlands were by this time occupied by the enemy. By a second order dated 31 January 1941 the trade marks were also vested in the Custodian. By a third order dated 17 April 1951 the Custodian was given the right to assign the trade marks. On 15 June 1951 the Custodian assigned the trade marks to the plaintiffs and on 13 November 1951 the latter were registered as proprietors of the trade

¹ [1946] 1 All. E.R. 36, at p. 41.

marks. By an Order in Council dated 6 July 1951 the state of war with Germany came to an end. The principal issue in the case was, therefore, whether the Custodian had power under the trading with the enemy legislation to assign the trade marks to the plaintiffs. The relevant Section of the Trading with the Enemy Act, 1939, i.e. Section 7 (1), gave the Board of Trade a general power to 'vest in the prescribed Custodian such enemy property as may be prescribed'. However, the Section opened with the words 'with a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace'. The defendant, relying on these words, argued that the order assigning the trade marks was *ultra vires*, since the only orders contemplated by the Section were orders fairly required, or justified, on the face of them for achieving the object of preventing the payment of moneys to enemies. It was contended, however, by the plaintiffs and also by Counsel for the Board of Trade as *amicus curiae* that these words were not so much an expression of the purposes to which individual orders made by the Board of Trade must be directed as an expression of the general Parliamentary purpose in conferring on the Board of Trade the order-making powers, and therefore that the Section need not be given a restrictive interpretation. The Court of Appeal accepted this contention, although Romer L.J. preferred to express no view, and Sir Raymond Evershed and Birkett L.J. both agreed that it is not the general policy of English law to confiscate the property of enemies. The Court was unanimous, however, in thinking that, irrespective of Section 7 (1) of the Trading with the Enemy Act, 1939, the transfer of the trade marks was justified under the Distribution of German Enemy Property Act, 1949, and the Distribution of German Enemy Property (No. 1) Order, 1950, made thereunder. For Section 1 (1) of the 1949 Act, passed in implementation of the Potsdam Agreement and other Allied conferences, provides that:

'His Majesty may by Order in Council make provision for the collection and realisation of German enemy property and for the distribution of the proceeds thereof, to such extent as may be prescribed by the Order, to persons who establish claims in respect of German enemy debts.'

It is submitted that, of the two reasons given by the Court of Appeal for dismissing the defendant's appeal, the second is the preferable one. In the latest edition of Oppenheim (*International Law*, vol. ii, 7th ed. by Lauterpacht, 1952) the view is expressed (at p. 331) that, while the confiscation of enemy private property may in certain circumstances be justifiable, at any rate at the time of the conclusion of peace, 'the existing practice prohibiting confiscation *pendente bello* is worthy of retention'. The decision of the Court of Appeal probably accords with this view for, as was expressly recognized, it has never been the general policy of English law to confiscate the property of enemies. This policy, however, as was stated by Lord Parker in *Daimler Co., Ltd. v. Continental Tyre and Rubber Co. (Great Britain), Ltd.*, is 'Subject to . . . anything to the contrary contained in the treaty of peace when peace comes'.¹ It was only owing to the extraordinary delay in concluding a peace treaty with Germany that the trading with the enemy legislation was still being invoked six years after the conclusion of actual hostilities. But, as was fairly observed by Sir Raymond Evershed, 'the passing of the Act of 1949 materially altered the nature of any arrangements that could reasonably be contemplated as likely, or, indeed, possible, to be made at the conclusion of peace'.

Prize Law—Capture of Means of Transport—Capture subsequent to Cessation of Hostilities.

Case No. 5. *Schiffahrt-Treuhand, G.m.b.H., and Others v. H.M. Procurator-General* (1953), 1 Ll. P.C. (2nd) 347. This case concerned a consolidated appeal brought by the respective former German owners of five objects condemned as prize on 10 May 1951 by Lord Merriman, President of the Probate, Divorce, and Admiralty Division. The facts, which

¹ [1916] 2 A.C. 307, at p. 347.

are given more fully in the report of Lord Merriman's judgment,¹ may be summarized briefly. On 4 May 1945 the German Army Group for the north-west area of Germany surrendered. On 8 May the total surrender of all the German armed forces was effected, and on 5 June the Allied Powers issued a declaration by which they took over the government of Germany. Meanwhile, Lübeck had been occupied by the Allied forces on 2 May, Emden on 6 May, and Flensburg on 10 May. In Lübeck hulls 347 and 348 lay on the stocks in a fairly advanced stage of construction. In Emden the *Hermes*, a motor-vessel, lay actually in the water, launched but not completed. In Flensburg hulls 507 and 508 lay on the stocks in an early stage of construction. Writs for the condemnation of these various 'structures' were not issued until 1947. It was held, however, by Lord Merriman that all five objects were proper subjects of capture in prize and lawfully condemnable. The principal contentions of the appellants were as follows: (i) that conscious volition or intention on the part of a captor was necessary to constitute capture in prize, and there was no such volition in this case until 1947, which was too late since the Crown had abrogated its right of seizure in prize at the latest by the declaration of 5 June 1945; (ii) that the Lübeck and Flensburg hulls, not being floating objects, were not capable of seizure in prize; and (iii) that, even if capture of a port by a belligerent without a conscious intention to seize individual hulls as prize sufficed to make the latter lawfully condemnable, this doctrine would not cover the Flensburg hulls, since Flensburg was not occupied by the Allies until after the German armed forces had totally surrendered.

It was *held* by the Judicial Committee of the Privy Council that the decision of Lord Merriman must be upheld. Evidence was given that the intention of the Combined Chiefs of Staff with regard to shipping captured from the Germans, was, first, to make immediate use of such shipping for operational purposes without the necessity of prize court formalities, and secondly, though at a later date, to seize it in prize so as to contribute to the prize funds available for prize bounty. Obviously the success of this plan depended upon the seizures in prize being effected before the right of making such seizures was abrogated. It was admitted, however, that this right had been abrogated as early as 5 June 1945. Nevertheless, it was held by the Board that, having regard to the earlier authorities such as Lord Stowell's judgment in *The Progress*,² already relied upon by Lord Merriman, and the language of the Naval Prize Act, 'seizure in prize' means nothing more nor less than 'physical capture'. Consequently, in this case, 'physical capture' before 5 June 1945 was sufficient. As for the question of the hulls which still lay on the stocks, there was no authority or decided case exactly in point so that it was necessary to follow Lord Mansfield's maxim and consider 'the reason of the thing'. The Board saw no reason to upset Lord Merriman's test of 'maritime property in a maritime town'. It was pointed out that, under Hague Convention No. IV of 1907, the protection given to private property *on land* did not extend to means of transport. There was also no force in the contention that, because seizure in prize is an act of hostility, the seizure of the Flensburg structures on 10 May 1945, two days after the total surrender of the German armed forces, was invalid. The Board held: (i) that a surrender is not truly analogous to a general armistice; and (ii) that, even during a general armistice, the right of visit and search and indeed the right to seize neutral vessels are not suspended so that, *a fortiori*, the right to take similar action against enemy vessels is not suspended. In regard to the particular surrender on 8 May it was pointed out that it was not the German Government which had surrendered, but only its armed forces. The German Government could have dismissed the High Command and raised new forces. There was nothing in the instrument of 8 May to prevent the Allies from advancing farther into German territory. Why therefore should they not continue to enjoy the right to seize German vessels on the high seas in prize?

Apart from the fact that it decisively confirms Lord Merriman's earlier judgment, this decision is in itself of no particular significance. Certain of the *obiter dicta* are, however, worth noting. In the first place, the Board agreed generally with Lord Merriman that 'the victor may abrogate his rights *jure belli*, including rights of Prize, not only by an express

¹ See this *Year Book*, 28 (1951), p. 404.

² (1810) Edw. 210.

renunciation, but also impliedly by his conduct, and . . . there may be circumstances in which unreasonable delay after an unconditional surrender in regulating the situation by a new declaration or arrangement may have a prejudicial effect on the victor's retention of his rights'. Secondly, referring to the fact that at the material time the war against Japan was still continuing, the Board agreed with the Crown's submission that 'when war is carried on by partners as allies, the unconditional surrender of one cannot protect it against the right of seizure so long as active hostilities are continued by a partner, unless the victor consents to abrogate his right'.

D. H. N. JOHNSON

B. PRIVATE INTERNATIONAL LAW

Public Policy—Foreign Revenue Law—Claim by Foreign Government in Winding-up of Company—Enforceability in England.

Case No. 1. The principle that English courts will not accord extra-territorial validity to the revenue laws of foreign States has seldom been challenged in recent years. It is accordingly interesting to note that in *Re Delhi Electric Supply and Traction Co., Ltd.*, [1953] 2 All E.R. 1452, the Court of Appeal were called upon to consider the scope and extent of this principle.

The Company, which was incorporated in England, had carried on business in India, under a licence granted by the Government of India, until 1947, when its undertaking was purchased by the latter under an option contained in the licence. During 1947 and 1948 the purchase price was paid and remitted to England. In May 1949 the Company went into voluntary liquidation. The Government of India claimed to be admitted as creditor in the voluntary liquidation in respect of assessments to Indian capital profits tax; the Liquidator rejected the claim. The Indian Government thereupon applied by summons in the Chancery Division under s. 307 of the Companies Act, 1948, for an order that the decision of the Liquidator rejecting their claim be reversed and the said claim be allowed in full. Vaisey J. refused the application, and the Indian Government appealed.

There were two main points which the Court of Appeal had to consider:

- (1) whether the claim made by the Government of India was in the eyes of English law a claim enforceable by legal process in England against the company or its assets;
- (2) whether, if it was not, it was nevertheless a claim for which the Liquidator should provide as one of the 'liabilities' of the company within the meaning of s. 302 of the Companies Act, 1948.¹

The Court of Appeal answered both questions in the negative, and accordingly dismissed the appeal.

Evershed M.R., in a long and weighty judgment, analysed and approved the argument, relied upon by the Liquidator, that the courts of this country cannot be used as a means of collecting taxes imposed by another State and that, consequently, the claim of the Indian Government could not be enforced by legal process in England. He referred to the modern cases of *Re Visser*² and *Sydney Municipal Council v. Bull*³ as supporting this proposition, and then proceeded to trace the origin of the principle. He thought that the first real state-

¹ Section 302 of the Companies Act, 1948, reads as follows:

'Subject to the provisions of this Act as to preferential payments, the property of a company shall, on its winding-up, be applied in satisfaction of its liabilities *pari passu*, and, subject to such application, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company.'

² [1928] Ch. 877; noted in this *Year Book*, 10 (1929), pp. 252-3.

³ [1909] 1 K.B. 7.

ment of the rule was to be found in Lord Mansfield's famous *dictum* in *Holman v. Johnson*.¹ Subsequent cases had, to a certain extent, shown that the proposition stated by Lord Mansfield was subject to some limitations. In particular, the case of *Alves v. Hodgson*² was authority for the rule that where, according to the foreign law, the absence of a stamp on a contract (such stamp being required by the revenue law of the foreign country) invalidated the contract altogether in that country, the contract could not be proceeded upon in England; in certain circumstances, therefore, the English courts would 'take notice' of foreign revenue laws. His Lordship was, however, of opinion that this slight limitation of Lord Mansfield's *dictum* had no bearing on the question before the court, i.e. whether the courts of this country could be used to collect the revenue of another country:

'I think, then, that these cases show that, though the full import of the words: "No country will take notice of the revenue laws of another country", may require explanation or even qualification, the true rule was then regarded, and should now be regarded, as well established that claims by representatives of a foreign sovereign state to recover penalties or the revenues of that state will not be enforceable in these courts.'

It also seemed significant to His Lordship that, under the Foreign Judgments (Reciprocal Enforcement) Act, 1933, no foreign judgment for a sum of money could be enforced in this country if the sum was a 'sum payable in respect of taxes or other charges of a like nature'.³

Both Jenkins and Morris L.JJ. expressed themselves in general agreement with this review of the authorities, Jenkins L.J. echoing a previous reference of Evershed M.R. to certain *dicta* of Lords Ratcliffe, Reid and Normand in *Kahler v. Midland Bank, Ltd.*⁴ supporting the general principle that foreign revenue laws are not regarded as having extra-territorial operation.

On the subsidiary question whether the word 'liabilities' in s. 302 of the Companies Act, 1948, should include a liability for tax due in a foreign country, notwithstanding that the foreign government could not directly sue in England to recover the sum due, all three Judges agreed that the word should be so construed as to exclude claims not enforceable according to the laws of England in the English courts. In reaching this conclusion they derived assistance from the principle established in *Re Lorillard*⁵ that debts statute-barred according to English law cannot be proved in an English administration.

The decision is clearly in accordance with established doctrine. It may, however, be admitted (with Morris L.J.)⁶ that there are disturbing implications in the situation that a company incorporated in this country, but carrying on business in another country, may be allowed to end its existence without having discharged its financial obligations to the Government of that other country; on the other hand, this is a situation which could, if it were considered necessary or desirable, be remedied by legislative action in this country, accompanied by international agreements based upon reciprocity.

Marriage—Singapore—Common Law Monogamous Marriage.

Case No. 2. Questions relating to the validity of common law marriages are rarely submitted for decision to the English courts. It will be recalled that in *R. v. Millis*⁷ the

¹ (1775), 1 Cowp. 341, at p. 343, where Lord Mansfield stated that 'no country ever takes notice of the revenue laws of another'.

² (1797), 101 E.R. 953: in two other cases, *James v. Catherwood* (1823), 3 Dow. and Ry. K.B. 190, and *Bristow v. Sequeville* (1850), 5 Exch. 275, the absence of a stamp only affected the admissibility in evidence of the document in the foreign country, as apart from its intrinsic validity, and it was therefore held that the contracts could be proceeded upon in England, questions of evidence being for the *lex loci* to determine.

³ Sections 1 (2) and 10.

⁴ [1949] 2 All E.R. 621; noted in this *Year Book*, 26 (1949), pp. 487-8.

⁵ [1922] 2 Ch. 638.

⁶ [1953] 2 All E.R. 1452, at p. 1470.

⁷ (1843-4), 10 Cl. and F. 534.

House of Lords held, though in a very unsatisfactory manner,¹ that, for a marriage contracted in England and Ireland, the common law requires the presence of an episcopally ordained priest; that, in subsequent cases, both English² and colonial courts³ upheld the formal validity of marriages by consent contracted abroad, in some place where there is no local form available or where the local form is of a non-Christian nature, without the presence of an episcopally ordained priest; and that this more liberal rule was confirmed, in respect of marriages contracted abroad, in the case of *Wolfenden v. Wolfenden*.⁴

The case of *Isaac Penhas v. Tan Soo Eng*, [1953] 2 W.L.R. 459, afforded the Judicial Committee of the Privy Council an opportunity of reviewing, and applying to a novel set of circumstances, the principle established in *Wolfenden v. Wolfenden*. The facts of the case, so far as relevant to the main issue before the Board, were that both parties to the marriage ceremony whose validity was being called in question were British subjects and were at all material times domiciled and resident in Singapore; the male party was of the Jewish faith, and the female party, who was of Chinese descent, belonged to a non-Christian sect. The marriage ceremony was performed at the house of the female party after the Chinese fashion. Although it was established that witnesses were present, and that each party was asked separately whether they were willing to become man and wife and replied in the affirmative, it was admitted that the ceremony was in fact a composite one to the extent that the wife had worshipped according to Chinese rites and the husband according to Jewish custom. Nevertheless, it was not disputed that the parties intended the ceremony to constitute a valid marriage, and that the parties in fact cohabited thereafter as man and wife. Upon these facts the Court of Appeal of the Colony of Singapore upheld the decision of the High Court of the Colony of Singapore affirming the validity of the marriage as a common law monogamous marriage.

On appeal to the Judicial Committee of the Privy Council it was contended against the validity of the marriage:

- (a) that the Christian Marriage Ordinance of Singapore, 1936, was applicable to the parties and that no marriage was valid unless celebrated in accordance with that Ordinance;
- (b) that the ceremony adopted was of a polygamous character, and that the male party had no capacity to contract a polygamous marriage; and
- (c) that the nature of the ceremony was equivocal and that the necessary *consensus ad idem* to prove a valid common law monogamous marriage had not been established.

Their Lordships rejected these arguments. They held that the 1936 Ordinance applied only to marriages in which one of the parties was a Christian, and was therefore inapplicable to the present circumstances, and that, by virtue of the decision in *Yeap Cheah Neo v. Ong Cheng Neo*,⁵ the English common law was in force in Singapore in so far as it was applicable. This being so, their Lordships had no difficulty in finding that there was nothing in the religions, manners or customs of Jews or Chinese domiciled in Singapore to prevent them from contracting a valid common law monogamous marriage, and that the lack of an episcopally ordained priest was no bar to the celebration of such a marriage:

"Their Lordships agree with the view expressed by Evans J. in the Court of Appeal in the present case that in a country such as Singapore, where priests are few and there is no true parochial system, where the vast majority are not Christians, it is neither convenient nor necessary that two persons such as the respondent and the deceased should be required to call in an episcopally ordained priest to effect a marriage. The

¹ See Cheshire, *Private International Law* (4th ed., 1952), p. 320, n. 2.

² *Catterall v. Catterall* (1847), 1 Rob. Ecc. 580.

³ *Maclean v. Cristall* (1849), Perry's Oriental Cases, 75; this was a case heard before the Supreme Court of Bombay.

⁴ [1946] P. 61; noted in this *Year Book*, 23 (1946), p. 389.

⁵ (1875), L.R. 6 P.C. 381.

case of *Wolfenden v. Wolfenden* and the cases there cited are in point and were in their Lordships' opinion rightly decided.¹

The only point outstanding was whether the ceremony was intended to constitute a common law monogamous marriage or a Chinese polygamous marriage. Their Lordships were of opinion that the evidence as it stood, including the whole circumstances surrounding the wedding, the presence of witnesses, the words spoken by the person who performed the ceremony, the cohabitation as man and wife, and the baptism of the children of the union as Christians, was sufficient to prove a common law monogamous marriage.

The case is interesting not so much for the establishment of any new principle as for the application of a confirmed principle to a novel set of facts. It is encouraging to note that the concept of an English common law marriage is sufficiently wide to comprehend a ceremony of so unusual a nature as that which was celebrated in this case. It would seem that the essential features necessary to constitute a common law marriage celebrated abroad are the consent of the parties freely expressed and the presence of witnesses, and that peculiarities of the ceremony as such will in large measure be disregarded so long as they do not infringe or entrench upon these essential features.

Marriage—Retroactive Foreign Law Validating Ceremony on Registration—Recognition in England.

Case No. 3. It will be recalled that, in the last issue of this *Year Book*,¹ the present writer commended the decision of Barnard J. (later affirmed by the Court of Appeal) in *Starkowski v. Attorney-General*.² From the decision of the Court of Appeal the petitioner has since appealed to the House of Lords, which dismissed the appeal.³

One interesting feature of the unanimous decision pronounced by the House of Lords was the reliance placed by their Lordships on the principle of reciprocity. It had been pointed out in argument that Parliament had frequently passed legislation retroactively validating marriages invalid for lack of some requisite formality, and that such validating legislation had not been confined to marriages between persons domiciled in England at the date of the marriage or at the date of the Act. On this point, Lord Tucker stated that 'it would seem to be in accord with comity and with principle that our courts should recognise the validity of similar foreign laws dealing with an aspect of marriage viz. formality, which has always been recognised as governed by the *lex loci celebrationis*'. The argument in favour of recognising the Austrian validating law as having an effect on persons domiciled in England, so far as based on reciprocity, also appealed to Lord Asquith of Bishopstone⁴ and to Lord Cohen.⁵

Lord Reid adopted a more teleological and practical approach. It was clearly unusual that foreign legislation should (whether incidentally or not⁶) alter the status of English people who were neither domiciled, resident nor present in the foreign country when the legislation took effect. What, however, was the alternative? If the legislature of the place of celebration could not effectively validate an invalid ceremony where the parties were no longer domiciled within the jurisdiction, what remedy was available to the parties?

'If people have lived and acted and brought up families in the reasonable belief that they were married, it is highly desirable that the law should recognize some practical way of neutralizing a belated and fortuitous discovery that their marriage was formally invalid. But if retrospective legislation in the country where the marriage was celebrated is to be of no avail to persons domiciled outside that country, it will seldom be possible for the country of their domicile to afford any remedy.'

¹ Vol. 29 (1952), pp. 479-81.

² [1952] 1 All E.R. 495; [1952] 2 All E.R. 616 (C.A.).

⁴ [1953] 3 W.L.R. 942, at p. 953.

³ [1953] 3 W.L.R. 942.

⁵ *Ibid.*, at p. 955.

⁶ Lord Tucker argued, in distinguishing the case of *Re Luck*, [1940] 3 All E.R. 307, that the Austrian legislation dealt primarily with the formalities of marriage and was not expressly directed to the alteration of status as such: *loc. cit.*, at p. 948.

He was therefore of opinion that 'the balance of justice and convenience' was in favour of recognizing the validity of the retroactive legislation in question.

Their Lordships carefully refrained from expressing any opinion as to whether the decision would necessarily have been the same if the parties had acquired a domicile in England and contracted a marriage otherwise valid by English law before the passing of the foreign validating statute.

The judgment is noteworthy for the impetus it gives to the growing recognition of reciprocity as a factor in determining the validity of foreign judicial or legislative acts.¹ It would now seem that where Parliament has taken power to validate marriages formerly invalid irrespective of the domicile of the parties, or to exercise divorce jurisdiction irrespective of the domicile of the parties,² or to provide for substituted service,³ the English courts will (subject to some limitations) recognize foreign judicial or legislative acts based upon substantially similar legislation in the foreign country concerned. The tendency to 'judicial legislation' in this field will be welcomed by private international lawyers, to whom it has often seemed that the legislature, while willing to extend and enhance the jurisdiction of the English courts or to affect incidentally the status of persons not domiciled in England, was unwilling to accept a corresponding enlargement of our recognition of similar foreign legislation.

Nullity—Jewish Bill of Divorcement—Declaratory Judgment Sought that Marriage Dissolved—Jurisdiction of Court to make Declaratory Order.

Case No. 4. The proceedings in the case of *Har-Shefi v. Har-Shefi*⁴ illustrate the dangers attendant upon an imperfect appreciation by the courts of the nature of the relief sought by the petitioner. The parties were married in 1950 according to Jewish rites in Israel, the wife being then domiciled in England and the husband in Israel; at the time when proceedings were commenced in the English courts in 1952, the wife was resident in England, and the husband resident and domiciled in Israel. In September 1951 the wife had received at the Beth Din, London, a Jewish bill of divorcement purporting to dissolve the marriage. She now sought a declaration that the marriage had thereby been validly dissolved.

The wife claimed that the Court had jurisdiction to make this declaration by virtue of Order 25, Rule 5, of The Rules of the Supreme Court, as interpreted in the recent cases of *Schuck v. Schuck*⁵ and *Igra v. Igra*.⁶ Barnard J. refused to make the declaration on two grounds:

- (a) In the cases referred to, the petitions were properly constituted petitions for jactitation of marriage,⁷ and did not therefore seek a bare declaration;
- (b) The wife was 'in effect, seeking a declaration of nullity'⁸ on the ground that her marriage had been validly *dissolved*,⁹ and therefore, on the basis of *De Reneville v. De Reneville*,⁹ the Court had no jurisdiction to entertain the petition on the strength of the wife's residence alone where the husband is both domiciled and resident abroad.

¹ See Russell in *International and Comparative Law Quarterly*, 1 (1952), pp. 181-95.

² *Travers v. Holley*, [1953] 2 All E.R. 794; noted *infra*, pp. 527-30.

³ *Boettcher v. Boettcher*, [1949] W.N. 83; noted in this *Year Book*, 26 (1949), p. 475. See also *Igra v. Igra*, [1951] P. 404; noted in this *Year Book*, 28 (1951), p. 409.

⁴ [1952] 2 All E.R. 821 (Barnard J.); on appeal [1953] 1 All E.R. 783 (C.A.); declaration granted [1953] 2 All E.R. 373 (Pearce J.).

⁵ (1950), 66 (Pt. 1) T.L.R. 1179; noted in this *Year Book*, 27 (1950), p. 469.

⁶ [1951] P. 404; noted in this *Year Book*, 28 (1951), p. 409.

⁷ The meaning of this expression is explained in this *Year Book*, 28 (1951), p. 409, n. 2.

⁸ Italics supplied.

⁹ [1948] P. 100; noted in this *Year Book*, 25 (1948), p. 429.

The Court of Appeal (Singleton L.J. *dubitante*) reversed the decision of Barnard J. and held:

- (i) that, by reason of Order 25, Rule 5, of the Rules of the Supreme Court, the Court does have jurisdiction to entertain a petition for a declaration even though no other relief is sought;
- (ii) that the Court had jurisdiction to hear the particular petition if the wife were domiciled in England, and as the domicile of the wife depended on the validity of the divorce in Israeli law, the Court could hear evidence of that law to determine whether the divorce was valid, so that it might consider whether the wife was domiciled in England.

To the first finding of the Court of Appeal few will wish to object. Denning L.J. traced the history of declaratory orders in the ecclesiastical courts, and established that these courts had repeatedly entertained suits for declarations of nullity when marriages were voided; but even apart from the jurisdiction which the Divorce Courts had inherited from the ecclesiastical courts, he considered that they had acquired under Order 25, Rule 5, a jurisdiction to make declaratory orders in the same way as the other Divisions of the High Court. He did not agree with Barnard J. in considering that *Schuck v. Schuck* and *Igra v. Igra* could be distinguished from the present case on the ground that the petitions in those cases were properly constituted petitions for jactitation of marriage.

‘It would be absurd if a petitioner had to insert a fictitious or unjustified claim for jactitation in order to get a declaratory order. I prefer to hold simply that under the modern rules the Divorce Courts have jurisdiction to make a declaratory order even though no other relief is sought.’

Singleton L.J. and Hodson L.J. concurred in this sentiment, but sounded a note of warning that petitions for a bare declaration would be carefully watched and might not be granted if no sensible purpose would be served thereby—‘the court will not grant a declaration in the air’.

It is the second finding of the Court of Appeal which may perhaps be open to question. The Court clearly accepted Barnard J.’s statement that a petition for a declaration that a marriage has been validly dissolved by a foreign divorce decree is analogous to a petition for nullity. It is submitted with respect that this is a false analogy,¹ and that there was no need for the Court to consider whether or not it had jurisdiction in accordance with the complicated rules laid down for the nullity jurisdiction of the English courts. When a petition for nullity is presented to an English court, the petitioner is asking the court to declare that there never was a marriage. The court is being asked to do something which might, depending upon whether the marriage was a void or a voidable marriage, directly affect the status of the parties. It is for this reason that the English courts have insisted that jurisdiction to entertain a petition for nullity in respect of a voidable marriage should be based upon (a) the common domicile of the parties,² or (b) more doubtfully, the common residence of the parties.³

The question whether a particular marriage is void or voidable is, on the basis of *De Reneville v. De Reneville*, referred to the law of the matrimonial domicile. The jurisdiction of an English court to entertain a petition for nullity in respect of a void marriage is predicated upon (a) the common domicile of the parties; or (b) the domicile of the petitioner

¹ See also, to the same effect, Thomas in *International and Comparative Law Quarterly*, 2 (1953), pp. 444-51.

² *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641; *Inverclyde v. Inverclyde*, [1931] P. 29; *De Reneville v. De Reneville*, [1948] P. 100.

³ *Easterbrook v. Easterbrook*, [1944] P. 10; *Hutter v. Hutter*, [1944] P. 95. *Dicta* in *De Reneville v. De Reneville* (at p. 116) (Greene M.R.) and in *Casey v. Casey*, [1949] P. 420 (at p. 443) (Somervell L.J.) support the proposition advanced, but the proposition is inconsistent with the actual decision in *Inverclyde v. Inverclyde*, where jurisdiction was denied even although it appeared that both parties were resident in England, though domiciled in Scotland.

alone;¹ or (c) celebration of the marriage in England.² It is doubtful to what extent residence of both parties, or even residence of the petitioner alone, suffices to render an English court competent to annul a void marriage.³ In addition to these bases of jurisdiction, certain statutory exceptions and modifications to the normal jurisdictional rules, covering both void and voidable marriages, have recently been promulgated.⁴

The reason why the English courts have seen fit to draw up such complicated jurisdictional rules and to make such distinctions between the exercise of jurisdiction in the case of a voidable marriage and the exercise of jurisdiction in the case of a void marriage is not far to seek. The petitioner in a nullity suit is asking for the court to do something positive—to declare that there never was a marriage either because of some defect rendering the marriage void *ab initio* or because of some defect rendering the marriage voidable at the suit of the petitioner. In the case of a voidable marriage the jurisdiction of the court should be sparingly exercised, as the effect of a decree, if granted, is to alter the status of the parties; whatever the form of the decree, it is in substance analogous to a decree of dissolution of marriage.⁵ The same is not necessarily true of a nullity decree in respect of a void marriage, and it has indeed been suggested that, inasmuch as an English Court may pronounce on the nullity of a marriage if the question arises incidentally in the course of other proceedings, regardless of the residence or domicile of the parties, there should be no jurisdictional rules in respect of void marriages.⁶

Whatever may be the merits of these conflicting opinions as to the bases of nullity jurisdiction, there is, it is submitted, no valid reason to add to the confusion by asserting that a declaratory order recognizing the validity of a foreign divorce decree is akin to a decree of nullity. In the case under review there clearly was a valid marriage, and the only question before the Court was whether that marriage had been validly dissolved in accordance with the law of the domicile. The Court was not being asked to make an order which would command 'international' recognition; it was merely being asked to declare what was the status of the parties in *English law* in view of the pre-existing foreign bill of divorcement. It is submitted that the Court was therefore wrong in principle in denying jurisdiction on the ground of the residence of the petitioner alone. There is clearly much to be said for the recent practice of the Divorce Courts in making declaratory orders recognizing the validity in English law of foreign divorce decrees; it enables the parties in cases of doubt to obtain an authoritative ruling as to their married or unmarried status in England. But the flexibility and convenience of the system are irretrievably lost if the jurisdiction of the court to make the necessary order is made dependent upon the jurisdictional rules applicable in the case of nullity petitions.

On the merits of the case⁷ Pearce J. had little difficulty in finding that the bill of divorcement, although delivered in London, was a valid divorce according to Jewish Rabbinical law despite the fact that there had been no judicial investigation. Expert evidence of Israeli law was given to the effect that exclusive jurisdiction is given to the Rabbinical courts on matters of marriage and divorce concerning members of the Jewish faith domiciled in Israel, and that therefore this particular divorce would be regarded as valid according to the law of Israel. Pearce J. did not consider that the absence of judicial proceedings affected the recognition of the divorce in England, and, following *Sasson v. Sasson*,⁸ he held that the marriage, having been dissolved by the only form of divorce open to a Jew domiciled in Israel, should be recognized as having been validly dissolved for the purposes of English law. As a whole, the decision on the merits is to be commended,

¹ *White v. White*, [1937] P. 111; *Kenward v. Kenward*, [1950] 2 All E.R. 297.

² *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67.

³ See Cheshire, *Private International Law* (4th ed.), pp. 344-5.

⁴ Matrimonial Causes Act, 1950, s. 18.

⁵ This was clearly the opinion of Bateson J. in *Inverclyde v. Inverclyde*, [1931] P. 29, at p. 40.

⁶ See Dicey, *Conflict of Laws* (6th ed.), pp. 252-3; but cf. the views of Fleming in *International Law Quarterly*, 3 (1950), pp. 239-40.

⁷ [1953] 2 All E.R. 373.

⁸ [1924] A.C. 1007.

although, as has been pointed out,¹ it does involve two slight extensions to the principle enunciated in *Armitage v. Attorney-General*,² i.e. that principle can now be applied to extra-judicial divorces, and it can also be applied where the divorce recognized by the law of the domicile is obtained, not in a third jurisdiction, but in England.

Divorce—Foreign Decree—Jurisdiction of Foreign Court—Recognition of Decree by English Court.

Case No. 5. The decision in *Travers v. Holley and Holley*, [1953] 3 W.L.R. 507, may well prove to be the starting-point for a new departure from long-settled principles relating to the recognition of foreign divorce decrees by English courts. Before *Travers v. Holley*, it was generally conceded that the only circumstances in which an English court would recognize a divorce decree pronounced in a foreign country were (a) where the parties were domiciled in the foreign country at the commencement of the proceedings,³ or (b) where the parties, though not domiciled in the foreign country, were domiciled in a third country which would recognize the validity of the divorce decree.⁴ The basis of these restrictive rules was that, as divorce involved a change of status, it was right and proper that the only courts competent to adjudge and determine whether a change of status had or had not taken place were the courts of the domicile; if these courts pronounced or recognized a divorce decree, that decree would be recognized in England; but no decree pronounced by a court of any country which was not the true domicile of the parties would be recognized in England as having dissolved the marriage (unless of course that decree would be recognized by the *lex domicilii*).

The facts in *Travers v. Holley* were relatively simple. In 1937 the parties married in England and shortly thereafter left England and went to New South Wales in Australia, taking with them all their possessions. In 1940, the husband left the wife at Sydney and moved north to Armidale in New South Wales. In 1941 he joined the Australian forces, and in 1943 obtained a transfer to the British forces. Meanwhile, in August 1943 the wife commenced proceedings for divorce in the Supreme Court of New South Wales on the ground of the husband's desertion since August 1940, and was granted a decree which was made absolute in November 1944. The husband was served with notice of the petition but did not defend, and both parties subsequently remarried. In 1952 the husband, whose second marriage had not proved satisfactory, petitioned the English courts for a decree of divorce from his first wife on the ground that the Australian decree was invalid because at the time it was granted neither husband nor wife was domiciled in New South Wales, and the wife, by remarrying, had been guilty of adultery. The Commissioner granted the husband a decree, exercising his discretion in the husband's favour in respect of his own adultery; the wife appealed.

It was held by the Court of Appeal:

- (1) (Jenkins L.J. dissenting) that the husband had acquired a domicile of choice in New South Wales, and the appeal should be allowed;
- (2) (*per totum curiam*) that even if, while in desertion, the husband had reverted to his English domicile of origin, the New South Wales decree would still have been recognized, since the New South Wales Court had exercised jurisdiction by virtue of statutory provisions⁵ which were identical in substance

¹ See Thomas, loc. cit., pp. 449-50.

² [1906] P. 135.

³ *Le Mesurier v. Le Mesurier*, [1895] A.C. 517.

⁴ *Armitage v. Attorney-General*, [1906] P. 135.

⁵ The wife's petition in the New South Wales proceedings had been based on the New South Wales Matrimonial Causes Act, No. 14, 1899, s. 16 (a):

'Any wife who at the time of the institution of the suit has been domiciled in New South Wales for three years and upwards (provided she did not resort to New South Wales for the

with the provisions of s. 13 of the English Matrimonial Causes Act, 1937.¹

Little need be said about the first finding of the Court of Appeal. Somervell L.J. and Hodson L.J. found little difficulty in holding that the parties had acquired a domicile of choice in New South Wales by 1940. Having regard to their second finding, they did not consider it necessary to determine whether the husband had in fact reverted to his English domicile of origin in 1943, nor whether the husband was now estopped from alleging the invalidity of the New South Wales decree in view of his subsequent conduct in relying on it.

Jenkins L.J., on the other hand, was not able to agree that the parties had acquired a domicile of choice in New South Wales by 1940. He pointed out that the onus of proving the abandonment of a domicile of origin in favour of a domicile of choice was upon the person alleging the change of domicile. In particular, referring to the authority of *Winans v. Attorney-General*² and *Ramsay v. Liverpool Infirmary*,³ he was of opinion that 'change of domicile, particularly where the change is from the domicile of origin to a domicile of choice (as distinct from a change from one domicile of choice to another) has always been regarded as a serious step which is only to be imputed to a person upon clear and unequivocal evidence'.⁴ He considered the evidence relating to the alleged change of domicile from England to be inconclusive, even if the requirement of intention could be met by an intention to settle permanently in Australia, as distinct from an intention to settle permanently in New South Wales. On this last point he approved the test laid down in *Gatty and Gatty v. Attorney General*,⁵ which was that what had to be proved was a domicile of choice in one of the particular States of a federal State, rather than in the federal State generally. He was therefore unable to agree with the majority of the Court on the essential question whether a domicile of choice had ever been acquired in New South Wales.

It is on the second ground of the Court of Appeal's decision that attention should be focused. Hodson L.J. pointed out that the classical rule on recognition of foreign divorces as set out in *Le Mesurier v. Le Mesurier* had been adopted at a time when the courts of this country only exercised divorce jurisdiction in cases where both parties were domiciled in England. However, in recent years, Parliament had conferred on the English courts jurisdiction to entertain divorce petitions in circumstances where the parties were not domiciled in England at the time of institution of the proceedings.⁶ The circumstances which entitled an English court to assume jurisdiction should be equally effective in the case of a foreign court:

'I would say that where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to purpose of such institution) may present a petition to the court praying that her marriage may be dissolved on one or more of the grounds following:

- (a) that her husband has without just cause or excuse wilfully deserted the petitioner and without any such cause or excuse left her continuously so deserted during three years and upwards *and no wife who was domiciled in New South Wales when the desertion commenced shall be deemed to have lost her domicile by reason only of her husband having thereafter acquired a foreign domicile.*' (Italics supplied.)

¹ In brief, s. 13 of the Matrimonial Causes Act, 1937, provides that the English courts will have jurisdiction in cases of desertion if the husband was domiciled in England immediately before the desertion, 'notwithstanding that the husband has changed his domicile since the desertion'. ² [1904] A.C. 287.

³ [1930] A.C. 588; noted in this *Year Book*, 12 (1931), pp. 197-8.

⁴ If the recommendations contained in the *First Report of the Private International Law Committee* (Cmd. 9068) are adopted by legislation, the difficulty of displacing the domicile of origin will largely disappear; furthermore, the principle laid down in *Udny v. Udny* (1869), L.R. 1 Sc. App. 441, that the domicile of origin automatically revives when a domicile of choice is abandoned without another domicile being acquired, will be abolished: Articles 1 and 2 (2) of the Code of the Law of Domicil (Appendix A to the Report).

⁵ [1951] P. 144; noted in this *Year Book*, 28 (1951), pp. 413-14.

⁶ S. 13, Matrimonial Causes Act, 1937; s. 1, Matrimonial Causes (War Marriages) Act, 1944; s. 18, Matrimonial Causes Act, 1950.

refuse to recognize a jurisdiction which *mutatis mutandis* they claim for themselves. The principle laid down and followed since the *Le Mesurier* case must, I think, be interpreted in the light of the legislation which has extended the power of the courts of this country in the case of persons not domiciled here.¹

What is the *ratio decidendi* of this case? It is difficult to suggest any clear answer. It may be that significance should be attached to the fact that the husband, if not domiciled in New South Wales, was domiciled in England, so that the principle laid down is applicable only when the parties are domiciled in England and the foreign court has exercised jurisdiction on grounds substantially similar to the grounds provided by English statute in the case of persons not domiciled here.² But what is the position when, for example, the husband is domiciled in Mauretania and the wife obtains a decree of divorce in Ruritania on the basis of three years' residence, and Mauretanian law, while not recognizing the divorce, nevertheless would permit the wife to petition for divorce on the basis of three years' residence? It is submitted that, in these circumstances, English law should not recognize the Ruritanian divorce. The law of the domicile should still be permitted to have a pre-eminent say in the recognition of a foreign divorce, even if the court which granted the divorce did no more than an English court would have done in like circumstances.

Furthermore, what is meant by 'substantial reciprocity'? Must the foreign court, when exercising jurisdiction in the case of deserted wives, exercise it on the basis that the wife is still deemed to have the same domicile as the husband possessed prior to the desertion,³ or may it exercise it on the basis that the wife can possess a separate domicile?⁴ Again, with reference to the exercise of jurisdiction on the basis of the wife's residence within the jurisdiction for three years prior to presentation of the petition, would 'substantial reciprocity' be achieved if the foreign court had exercised jurisdiction on the basis of a lesser period of residence (e.g. two years), or on the basis of the residence within the jurisdiction for three years of the husband? It is almost impossible to suggest how the courts would approach these problems.

A more pertinent question is: what exactly did the Court of Appeal mean by 'jurisdiction' in *Travers v. Holley*? It has been suggested⁵ that the term 'jurisdiction' as used in the judgment should be construed as covering ground of petition, ground of jurisdiction, and basis thereof. If this were so, a Utopian decree founded on the jurisdictional basis of three years' residence by a wife petitioner would only be recognized in England if the grounds for the divorce were grounds authorized by English law. This is hardly consistent with the decision in *Bater v. Bater*,⁶ where it was held that the validity in England of a divorce obtained in the country of the domicile is not affected by the fact that it was granted for some cause which is inadequate by English law. It is submitted, therefore, that, whether or not the grounds for the divorce are grounds which exist in English law, a divorce pronounced by a foreign court will be recognized in England if the respondent is domiciled in England and the foreign court exercised jurisdiction (in the strict sense) on the basis of circumstances which would have entitled an English court to exercise jurisdiction. It is, of course, true that this may lead to some strange results, e.g. a wife could obtain a divorce in a foreign court after three years' residence in the foreign country on a ground which would not be open to her in England. The remedy, however, is for the English courts, when exercising this particular statutory jurisdiction,

¹ [1953] 3 W.L.R. 507, at p. 516; *per* Hodson L.J.

² See *Law Journal*, vol. 103, pp. 602-3.

³ E.g. Queensland (Marriage Causes Amendment Act, 1923); Victoria (Marriage Act, 1928, s. 75); Tasmania (Act No. 65 of 1919); New Zealand (Divorce and Matrimonial Causes Act, 1928, s. 12 (2)).

⁴ This is the position in a number of the States of the United States of America. In some of these States, the acquisition of a separate domicile depends on the wife being the innocent party or having good cause for leaving the matrimonial home.

⁵ See Thomas in *International and Comparative Law Quarterly*, 3 (1954), pp. 156-9.

⁶ [1906] P. 209.

to adopt the proper choice of law rule, and grant divorces only on grounds which would be grounds for divorce by the law of the domicile of the husband. If this were done, recognition in England of foreign divorces pronounced by courts other than the court of the domicile could be limited to those where (the comparative jurisdictional requirements having been met and the parties being domiciled in the English sense in England) the grounds for divorce coincided with the grounds authorized by English law. So long as English law insists on applying the *lex fori* to the substantive question of grounds for divorce notwithstanding that the jurisdiction of the English courts is not based on domicile, it would seem to be in accordance with principle that English courts should recognize foreign divorce decrees based on substantially similar jurisdictional requirements, even if the foreign court granted the decree on a ground which would not be a ground for divorce in England.

It will be appreciated that the case of *Travers v. Holley* has, in a sense, raised more problems than it has resolved. Nevertheless, the decision should be welcomed as a bold attempt to introduce the concept of reciprocity into the field of divorce jurisdiction. It is sufficient that it should stimulate consideration of the very difficult problems involved in the recognition of foreign divorce decrees; the legislature has too often been content to extend the jurisdiction of the English courts without making similar provision for the recognition of foreign divorce decrees pronounced on the basis of similar extending legislation in the foreign country.

Divorce—Practice—Dispensing with Service.

Case No. 6. In recent years the English courts have frequently been called upon to consider the circumstances in which leave will be granted to a wife petitioning for divorce on the ground of desertion to dispense with service of the petition on the husband when the latter is outwith the jurisdiction. It will be recalled that in three modern cases¹ the Court of Appeal have, for various reasons and in differing circumstances, granted the necessary leave. By way of contrast the case of *Spalenkova v. Spalenkova*, [1953] 2 All E.R. 880, deserves attention, for Willmer J., in circumstances which were clearly as unfortunate from the point of view of the wife as the three earlier cases, refused to grant leave to dispense with service.

The facts were that the parties lived together for some time after the war, mostly in Czechoslovakia. In 1947, the wife came to England, leaving the husband still residing in Czechoslovakia. It was alleged that the husband had promised to join the wife in England, but that he did not do so and ignored her letters. The wife had ascertained from correspondence with the husband's sister-in-law that the husband was arrested in 1950 and had remained under restraint ever since in Czechoslovakia. The wife had attempted to effect service on the husband by post, through the Czechoslovak Embassy in London and through the agency of the sister-in-law, but she had received no answer from him.

On these facts, Willmer J., after a careful consideration of the authorities, refused leave to dispense with service. He distinguished *Weighman v. Weighman* by pointing out that, in that case, the respondent spouse was at least aware of an intention on the part of the wife to institute proceedings. In *Heath v. Heath* the probabilities were that the husband had received the petition, and in *Paolantonio v. Paolantonio* the facts were that nobody had the faintest idea where the respondent was. In none of these three cases (and this was a point on which Willmer J. placed special emphasis) was there any question of the husband being under restraint so as to prevent him from acknowledging service or from lodging a defence. He considered that the present case was more analogous to those of *Read v. Read*² and *Luccioni v. Luccioni*,³ where the respondents were either alien enemies

¹ *Weighman v. Weighman*, [1947] 2 All E.R. 852; *Heath v. Heath*, [1950] 1 All E.R. 877; *Paolantonio v. Paolantonio*, [1950] 2 All E.R. 404. The last two cases were noted in this *Year Book*, 27 (1950), p. 471.

² [1942] 1 All E.R. 226.

³ [1943] 1 All E.R. 260, 384.

or resident in enemy territory and so unable to communicate and leave to dispense with service had been refused.

He admitted that a decision to refuse leave might constitute a grave hardship for the wife; but, as against that, a decision to grant leave might cause injustice to the husband, for, if leave were granted, the probability was that, within a few weeks, a decree absolute would be pronounced in respect of which the husband would have had no opportunity of being heard. On balance, Willmer J. thought it wiser not to exercise his discretion in favour of the wife on the practical ground that, by refusing leave, he would not be causing irremediable hardship to one party or the other:

'What has finally influenced me as to the way in which I should exercise my discretion is the fact that, if I act in one way [i.e. by granting leave], the damage may be irrevocable, whereas, if I act in the other way, no irrevocable damage will have been done.'

The conflict of interests which Willmer J. was called upon to resolve is a very real one, and the decision, though unfortunate from the point of view of the wife, is probably justifiable; there can be no doubt that the matrimonial problems arising from present-day political conditions in eastern European States defy easy solution.¹

Divorce—Practice—Stay of Proceedings.

Case No. 7. The case of *Sealey (otherwise Callan) v. Callan*, [1953] 1 All E.R. 942, displays a somewhat insular approach to the problems raised by conflicts of divorce jurisdiction. The facts were that the wife, who was separated from the husband, filed a petition for divorce in the English courts on the ground of desertion; she alleged, for the purposes of s. 18 (1) (b) of the Matrimonial Causes Act, 1950, that she had been resident in England for three years and that, therefore, the Court had jurisdiction. The husband, resident and domiciled in South Africa, entered a conditional appearance under protest that the Court had no jurisdiction, and issued a summons for directions; later he amended this summons so as to apply for a stay of the wife's petition. Immediately thereafter, he obtained leave from the Supreme Court of South Africa to issue proceedings for divorce in South Africa on the ground of his wife's adultery, and an order for service out of the jurisdiction on the wife was made. The issue which Davies J. had to consider was whether the wife's petition should be stayed until after determination of the husband's suit in South Africa, on the ground that South Africa was the *forum conveniens*.

Counsel for the husband produced powerful arguments in favour of a stay:

- (1) The evidence of South African law proved that any decree obtained by the wife in an English court, not being a court of the domicile of the parties, would not be valid in South Africa;
- (2) The husband could only defend the proceedings in England and could not, even if successful, obtain a decree of dissolution from the English court;
- (3) Whatever happened in the English court, it would be necessary for the husband to take proceedings in South Africa to dissolve the marriage;
- (4) It was undesirable and contrary to public policy that there should be two similar suits proceeding simultaneously in different countries; there might be an undesirable race to obtain judgment, for if the South African court pronounced a decree first, the English court could not act further under s. 18 (1) (b) of the Matrimonial Causes Act, 1950, a competent court having already dissolved the marriage.²
- (5) In view of the fact that the South African court was the court of the domicile, which English law recognized as being peculiarly competent to dissolve the marriage,³

¹ See *Kenward v. Kenward*, [1950] 2 All E.R. 297; noted in this *Year Book*, 27 (1950), pp. 467-9.

² *Boettcher v. Boettcher*, [1949] W.N. 83; noted in this *Year Book*, 26 (1949), p. 475.

³ *Le Mesurier v. Le Mesurier*, [1895] A.C. 517; but note the inroads made on this principle in *Travers v. Holley*, [1953] 2 All E.R. 794; noted *supra*, pp. 527-30.

the jurisdiction of the court should be preferred to the special jurisdiction of the English court under s. 18 (1) (b) of the Matrimonial Causes Act, 1950.

- (6) If two suits were to go on, the greatest inconvenience and expense would be caused to everyone concerned, particularly the husband.

As against this, it was argued for the wife that she was fully entitled to bring this suit, and that there might well be advantage to her in bringing a suit here rather than defending one in South Africa. It was pointed out, for example, that under South African law the wife could not obtain an order for maintenance save by consent. It was also alleged that there had been great delay on the part of the husband in bringing the suit in South Africa, and that it would be just as unfair to the wife to ask her to go to South Africa to defend the husband's petition as it might be unfair to the husband to ask him to come here to defend the wife's petition.

Davies J. did not consider that the husband had made out a case for a stay. He cited *St. Pierre v. South American Stores (Gath and Chaves) Ltd.*¹ in support of the principle that the plea of *lis alibi pendens* should be treated with the utmost caution. Although it was argued strenuously for the husband that the cases of *Thornton v. Thornton*² and *Baroness von Eckhardstein v. Baron von Eckhardstein*³ (in both of which the application for a stay was refused) were distinguishable from the present case in that the English proceedings in those cases were not proceedings *in rem* which might result in a decree purporting to affect status, the learned Judge was not prepared to accept the distinction. To him, it was significant that the wife would derive advantage from proceeding in England, and it seemed wrong to deprive her of that advantage:

'In my judgment, on the authorities it requires a very strong case to persuade this court to prevent a party from proceeding, whether it be with an action at common law or a petition in this court, when this court has beyond question jurisdiction in the matter, on the ground that the defendant or the respondent in this court has either previously, as in some of the cases, or subsequently, as in the present case, started what for convenience I may call a cross-action or cross-petition in a foreign jurisdiction. In view of all the circumstances, in this case, in view of the undoubted possibility that the wife may be able to derive advantages from exercising the right which she has to proceed here, in view of the fact to which I cannot shut my eyes that there has been at least some delay by the husband in setting the machinery of the law moving in South Africa when he had ground for thinking that he had a cause for complaint against his wife, I am not satisfied that the husband has here made out his case for a stay.'

The decision has been the subject of some adverse criticism. It has been pointed out⁴ that if the wife obtains her English decree first, difficult problems might arise on the recognition of the subsequent South African decree and on the enforcement of ancillary orders.

It is indeed open to question whether the discretion to stay actions should not be more liberally exercised when the jurisdiction exercisable by the English court is a special statutory jurisdiction, and the jurisdiction exercisable by the foreign court is based on the domicile of the parties. It is at least a consolation to know that the plea of *forum non conveniens* is more liberally considered when the English court is determining whether it ought to exercise jurisdiction under Order XI, Rule 1, than when it is asked to stay pro-

¹ [1936] 1 K.B. 382; noted in this *Year Book*, 18 (1937), p. 234.

² (1886), 11 P.D. 176: this was a case where the husband had commenced divorce proceedings in India, and the wife countered by filing a petition in the English courts for restitution of conjugal rights.

³ (1907), 23 T.L.R. 539, 593: in this case, the wife had filed a petition for judicial separation in England, and the husband had thereafter commenced divorce proceedings in Germany.

⁴ See *Law Journal*, vol. 103, p. 603.

ceedings properly and regularly brought in accordance with recognized jurisdictional principles.¹

Practice—Service out of jurisdiction—R.S.C. Ord. XI, r. 1 (e) (ii) and (iii)—Proper law of Contract.

Case No. 8. The case of *The Metamorphosis*, [1953] 1 All E.R. 723, is interesting to the private international lawyer, not so much for the actual decision reached on the complicated facts, as for the discussion of the general principles on which English courts will exercise their discretion to permit service out of the jurisdiction under Order XI, Rule 1, of The Rules of the Supreme Court. Briefly, the salient facts were that the plaintiffs, a Dutch company, were consignees named in the bill of lading for goods shipped from Sweden to the Netherlands on board a Greek ship owned by the defendants, a Greek firm operating in Greece; the claim was for non-delivery of the goods. The charter-party, made between the defendants and the Netherlands Government, had been signed on behalf of the defendants by an English company, resident in England. On 1 August 1952 an order was made *ex parte* by the Registrar giving leave to serve the writ, or notice of the writ, out of the jurisdiction, namely, in Greece. The defendants entered a conditional appearance, and moved to set aside the service and notice of the writ.

The plaintiffs argued that this was a case in which the Court could properly exercise its discretion to permit service out of the jurisdiction under Order XI of The Rules of the Supreme Court on the following grounds:

- (a) that the contract was by implication governed by English law (R.S.C. Ord. XI, Rule 1 (e) (iii)); or alternatively
- (b) that the contract was made by or through an agent trading or residing within the jurisdiction (R.S.C. Ord. XI, Rule 1 (e) (ii)).

Karminski J., after considering the nature of the contract very carefully, came to the conclusion, contrary to the contention of the plaintiffs, that the plaintiffs were not in fact the charterers, and that therefore the only evidence of the contract of carriage was contained in the bill of lading. Was there any indication that the parties had intended to apply English law as the proper law of the contract? The learned Judge maintained that, as there was no express incorporation of English law, this was a matter of inference or implication. No firm conclusion could be drawn from the fact that both the charter-party and the bill of lading were drawn up in the English language. In view of all the facts, he felt bound to hold that it was not the intention of the parties that the contract should be governed by English law, and that therefore the case did not come within Order XI, Rule 1 (e) (iii). Likewise, the contract in issue (namely, that contained in the bill of lading) was not a contract made by or through an agent trading or residing within the jurisdiction, as required by Order XI, Rule 1 (e) (ii), for it was only the charter-party which had been signed on behalf of the defendants by the English company resident in England. Consequently, the order made on 1 August 1952 by the Registrar giving leave to serve notice of the writ outside the jurisdiction should be set aside.

Having disposed of the principal issue, Karminski J. proceeded to consider the manner in which the discretionary power of the Court with regard to service out of the jurisdiction should be exercised. He emphasized that the Court should always exercise great care in considering whether or not to allow service out of the jurisdiction by reason of the fact that it may put the foreigner to great inconvenience and expense if he must contest his rights in the English courts; in this connexion, he cited approvingly *dicta* of Kennedy L.J. in *The Hagen*² and Pearson J. in *Société Générale de Paris v. Dreyfus*.³ He thought therefore that, in the present case, the 'balance of convenience' would not have lain in

¹ In this connexion, compare the remarks of Karminski J. in *The Metamorphosis*, [1953] 1 All E.R. 723; noted on this page (Case No. 8).

² [1908] P. 189, at p. 204.

³ (1885), 29 Ch. D. 239, at p. 242.

favour of bringing the defendants to England, even if the case could have been brought within the ambit of Order XI, Rule 1.

This salutary reminder of the nature of the discretionary power vested in the courts and of the manner in which it should be exercised is to be welcomed.

Contract—Charter-party—Goods Shipped at French Port on Italian Vessel—Proper Law.

Case No. 9. A perennial source of litigation in the English courts is the necessity to determine what is the proper law of a contract concluded in one country and to be performed in another. In *The Assunzione*, [1953] 1 W.L.R. 909, Willmer J. was faced with the difficult task of deciding, as a preliminary point of law, what was the law to be applied to a particular contract of affreightment in the absence of any express indication of the intention of the parties. The facts were that a charter-party dated 'Paris, October 7, 1949' was negotiated between brokers in Paris and Genoa, acting respectively on behalf of French charterers and Italian shipowners. In pursuance of the charter-party, which was made on a uniform general charter form in the English language, cargo was shipped at Dunkirk on board an Italian vessel for conveyance to Venice under a bill of lading issued under the charter-party; the bill of lading was in the French language, but the freight was to be paid in Italy in Italian currency. As neither party contended for the application of English law to the contract, the issue which Willmer J. had to determine was whether the proper law of the contract was French law or Italian law.

Counsel for the plaintiffs argued that the presumption in favour of the *lex loci contractus* should prevail. They cited in support of this proposition the case of *Chartered Mercantile Bank of India, London and China v. Netherlands India Steam Navigation Company*,¹ where the Court of Appeal had applied the *lex loci contractus* to a contract of affreightment concluded in Singapore. That case was distinguishable, however, on the facts, for although the ship wore the Dutch flag she belonged to an English company, and, as the charterers were also English, it was therefore right and proper that English law should be applied. The plaintiffs also relied on *dicta* of members of the Court of Appeal in *In re Missouri Steamship Company*² and *The Industrie*,³ but Willmer J. rejected the contention that these *dicta* supported the proposition that the primary inference is to be drawn from the place where the contract was made. The defendants maintained that there existed in cases of this type a presumption in favour of the law of the flag. They referred, *inter alia*, to *Lloyd v. Guibert*,⁴ but Willmer J. maintained that that case was not directly relevant inasmuch as it had arisen not strictly out of the contract of affreightment, but out of the authority of the master to act when in a foreign port in circumstances of distress.

Willmer J. was clearly of opinion that both sides were mistaken in trying to argue that particular aspects of the transaction raised a 'primary inference' or 'presumption' in favour of a particular law:

'It seems to me therefore that the ship's flag of nationality, and the place where the contract is made, are no more than circumstances which the court must take into consideration, together with all the other circumstances of the case, in order to arrive at the right inference as to what intention ought to be imputed to the parties.'

What principles, however, were to be applied in imputing an intention to the parties? The learned Judge, relying on certain pronouncements made in *The Adriatic*⁵ and *The Njegos*,⁶ where reference was made to considerations of 'convenience' and 'business efficacy', thought that the test to be applied should be 'what intention ordinary, reasonable, and sensible business men would have been likely to have had if their minds had been directed to the question'. On this basis, and taking all the circumstances into consideration, he gave judgment in favour of the defendants, holding that the indications in favour of Italian law were much more powerful than those in favour of French law.

¹ (1883), L.R. 10 Q.B.D. 521.

³ [1894] P. 58.

⁵ [1931] P. 241; noted in this *Year Book*, 13 (1932), pp. 184-5.

⁶ [1936] P. 90; noted in this *Year Book*, 18 (1937), pp. 227-9.

² (1889), 42 Ch. D. 321.

⁴ (1865), L.R. 1 Q.B. 115.

The decision has much to commend it. It is clearly right that, where the parties have given no indication of their intentions as to the law to be applied to a particular contract, the totality of the circumstances surrounding the nature, formation, performance and discharge of the contract should be taken into account in determining the proper law; no undue prominence should be given to any one consideration and, above all, no 'presumption' in favour of a particular legal system should be allowed to obscure the generality of the review of the matters to be taken into consideration. It may be that this doctrine can be criticized as leaving open a very wide area of judicial discretion, but it is submitted that it is at least preferable to the continuance of a system whereby emphasis is laid on certain aspects of a contractual transaction as promoting presumptions in favour of particular legal systems, especially where, as in this case, conflicting presumptions may be adduced in respect of the same transaction.

Contract—Remoteness of Damage—Applicability of Proper Law.

Case No. 10. It is a generally accepted rule of English private international law that, when there has been a breach of a contract involving a foreign element and an action for damages is subsequently brought in England, the issue of measure of damages is governed by the *lex fori*.¹ Professor Cheshire has argued with some force² that this principle is unsound unless a clear distinction is drawn between the issue of remoteness of damage or liability and the issue of measure of damages:

'The rules relating to remoteness indicate what kind of loss actually resulting from a commission of a tort or from a breach of contract is actionable; the rules for the measure of damages show the method by which compensation for an actionable loss is calculated.'

On this basis, he has asserted that, in principle, the issue of remoteness of liability should be determined by the proper law of the contract. The proper law fixes the nature and content of the contract; it should therefore be entitled to determine the consequences of a breach.³

It is gratifying to note that in *J. D'Almeida Araujo Lda. v. Sir Frederick Becker & Co., Ltd.*, [1953] 2 All E.R. 288, the distinction so cogently advocated by Professor Cheshire was adopted as the basis of Pilcher J.'s decision.

The facts were that the defendants, an English company, agreed to buy five hundred tons of palm oil from the plaintiffs, a Portuguese company. Payment was to be made by the defendants opening a credit in escudos in Lisbon in favour of the plaintiffs. Both the plaintiffs and the defendants were middlemen in the transaction, and, to fulfil their contract with the defendants, the plaintiffs bought the palm oil from M. in Lisbon. By their contract with M., the plaintiffs were to open a credit in Lisbon in escudos in favour of M. and, if either party defaulted, that party was to pay to the other party, as indemnity for the damage, an amount corresponding to 5 per cent. of the total value of the contract. The defendants failed to open the necessary credit in Lisbon, as a result of which the plaintiffs did not open the credit in favour of M., and were compelled to pay him £3,500 as indemnity.

Both parties agreed that the proper law of the contract was Portuguese law, but, while the plaintiffs contended that the extent of the damages to which they were entitled was also to be determined by Portuguese law, the defendants contended that all procedural or remedial questions, including the whole issue of damages, were to be determined by the *lex fori*.

Pilcher J. held that the question whether the plaintiffs could recover from the defendants the £3,500 which they had paid to M. was one of remoteness of damage, to be

¹ See Dicey, *Conflict of Laws*, 6th ed., pp. 649-50; *Kohnke v. Karger*, [1951] 2 K.B. 670; noted in this *Year Book*, 28 (1951), p. 411.

² See Cheshire, *Private International Law*, 4th ed., pp. 656-63.

³ *Ibid.*, p. 660.

determined by Portuguese law as the proper law of the contract.¹ He cited with approval the passages from Cheshire's *Private International Law* to which attention has been drawn, and noted that the Supreme Court of Canada had reached a similar conclusion in *Livesley v. Horst*.²

The decision is of some significance. It introduces a welcome note of common sense into a branch of the law where previously the authorities were scanty and obscure. It now seems clear that, when an action for breach of contract involving a foreign element is brought in this country, all questions relating to the 'nature and extent of the obligation' undertaken, including the question of the kind of loss for which damages are recoverable upon breach, will be regarded as being governed by the proper law.

Succession on Intestacy—Foreign Domicil of Intestate—Personal Property in England—Claim of Foreign State as Universal Heir.

Case No. 11. The case of *In the Estate of Maldonado*, [1953] 3 W.L.R. 204, does not warrant lengthy consideration. Briefly, the facts were that the deceased died intestate, a Spanish subject domiciled and resident in Spain, leaving personal property in England. The State of Spain as plaintiff claimed to be the sole and universal heir to the deceased's estate by Spanish law; the defendant in the action, the Treasury Solicitor, claimed that the estate of the deceased in England belonged to the Crown as *bona vacantia*, and that he was therefore entitled to a grant of letters of administration to the estate in England.

There was no doubt that the primary principle to be applied was that movable property in the case of intestacy should be distributed according to the law of the domicile of the deceased at the time of his or her death. To this principle there existed one exception: where the deceased died intestate in the foreign country leaving property in England, and there was, in default of next of kin, no true succession to the movables according to the foreign law but merely a right of the foreign State to take as *bona vacantia*, then English law would recognize the prior right of the Crown to take the movable property in England as *bona vacantia* on the ground that the right of the foreign State was not a right by way of succession, but a right based on the fact that there was no succession.³

Barnard J., after hearing expert evidence of Spanish law, held:

- (a) that the real issue to be determined was the capacity in which the person claims the property, whether by virtue of heirship or by virtue of a *jus regale* over *bona vacantia*;
- (b) that, by Spanish law, the State of Spain was a true heir according to the Spanish conception of that term, just as any other individual heir;
- (c) that there was nothing either contrary to English public policy or repugnant to English law in permitting a foreign State to take possession of the movables of one of its subjects in this country;
- (d) that, accordingly, letters of administration should be granted to the duly appointed attorney of the Spanish State.

The Court of Appeal dismissed an appeal from this decision.⁴ In the appellate proceedings, Counsel for the defendant narrowed his argument to an attack on ground (c) of Barnard J.'s judgment. He advanced the following proposition:

'In the case of a national of another state dying domiciled in the other state, and dying,

¹ Pilcher J. found as a fact that the plaintiffs could have recovered the £3,500 from the defendants under Portuguese law, subject to their obligation to mitigate those damages. He further held that the obligation to mitigate was the same under Portuguese as under English law, and that, if the plaintiffs had disposed of the palm oil after being notified of the defendants' default, they would have suffered no damage. He accordingly awarded them nominal damages of 40 shillings.

² [1924] S.C.R. 605; [1925] 1 D.L.R. 159.

³ See *In Re Barnett's Trusts*, [1902] 1 Ch. 847; and *In the Estate of Musurus*, [1936] 2 All E.R. 1666.

⁴ [1953] 2 All E.R. 1579.

according to its laws, intestate (as in the present case) the English courts will not recognize as having a title in this country to the movables of the intestate any persons who are not 'successors' in accordance with some generally recognized nexus of personal relationship with the intestate, or, at least, will not recognize as a successor the foreign state itself which has made itself such by its own laws; for notwithstanding the language used in those laws, the truth is that the state is exercising the equivalent of our *jus regale* as regards ownerless property.'

This argument did not commend itself to the Court. Evershed M.R., after considering the relevant cases and textbooks, could find no rule 'which confines successors to individuals having a particular quality or characteristic, or which has the effect of excluding a State from entertaining the capacity'. Jenkins and Morris L.JJ. were more impressed by the consideration that, if the English courts were to stop short of recognizing the foreign succession law in its entirety by refusing to acknowledge the right of the foreign State to constitute itself a 'successor', they would be adopting an artificial and unreal distinction, for it had been conceded in argument that there was no objection to the foreign succession law constituting legal bodies or corporations, other than the State, as true 'successors'. In the view of Morris L.J., the argument for the Crown 'requires partial non-acceptance of the law of succession of the domicile, and the existence of the alternative submission points to the fact that the court is really being asked to fix in arbitrary manner some limit to the extent of the adoption of the law of the domicile relating to succession'.

It is submitted that the attitude adopted by the Court of Appeal is sound. It may indeed be a matter for regret that foreign States should pass laws constituting themselves, in default of next of kin, successors to the private property of their nationals dying intestate. Nevertheless, if it is once conceded (as it must be conceded) that the foreign State is alone competent to adjudge and determine its law on intestate succession, there is no valid reason for refusing to acknowledge that competence in any particular instance, even when the effect of the foreign succession law, by declaring the State to be in certain circumstances a true heir, entrenches upon the right of the Crown to claim movables in England as *bona vacantia*. The real issue in any disputed case must be whether the foreign claimant can prove that his right to take the property is a true right of inheritance under the foreign succession law rather than a right based on the paramount claim of the State to take ownerless property. But implicit in the judgment in this case there may also be discerned the feeling that, where there are no true private heirs and the issue is which of two States should take, the State of the domicile (particularly if it is also that of the nationality) has a strong moral claim which warrants consideration, whether that claim be by way of inheritance or by way of a *jus regale* over *bona vacantia*.

I. M. SINCLAIR

REVIEWS OF BOOKS

Annual Digest and Reports of Public International Law Cases, 1948. Edited by H. LAUTERPACHT. London: Butterworth & Co. (Publishers), Ltd. 1953. xxviii+706 pp. £3. 10s. *od.*

The latest volume of the *Annual Digest* differs from its immediate predecessors in that at last it contains again international decisions in the true sense of the word, and that almost precisely one-half deals with the law of warfare. The international decisions are those rendered by the International Court of Justice in *Article 4 of the Charter of the United Nations (Admission of a State to the United Nations)* and in the *Corfu Channel* case (Preliminary Objection). The cases on the law of warfare include, in particular, the decision of the International Military Tribunal at Tokyo in *In re Hirota and Others*, which will attract special interest because it does not seem to have been reported elsewhere; and the decision, in the same case, of the Supreme Court of the United States, which denies a writ of habeas corpus to those convicted by the Tokyo Court. The Editor rightly decided to report numerous cases on war crimes which came before military tribunals and which, as this volume again demonstrates, have made a substantial contribution to the law. The effects of breaches of the Hague Regulations had to be considered in many countries. Two decisions of the Swiss Federal Tribunal (Cases No. 150 and 177) are of particular importance; the statement that 'an object seized from its owner in a manner contrary to international law has, without doubt, the character of stolen or lost property' is highly significant and deserves full approval. It may be contrasted with the *dictum* contained in a German decision (which, incidentally, is full of curious and wholly unnecessary *dicta*) that 'according to international law international delinquencies give rise only to a duty on the part of States to pay compensation' (Case No. 125).

As regards the law of peace, this volume contains no less interesting material. Thus it will be remembered that the Supreme Court of the United States caused surprise by holding in *Connell v. Vermilya-Brown* that the bases in Newfoundland leased to the United States of America were 'territory or possessions of the United States' within the meaning of the Fair Labor Standards Act. It is satisfactory to learn that the Supreme Court did not extend this doctrine, but held in *Spelar v. United States* (Case No. 24) that the Newfoundland bases were a 'foreign country' within the meaning of the Federal Tort Claims Act. Two decisions of the Italian Supreme Court throw fresh light on the Italian practice relating to a foreign State's immunity from jurisdiction in Italian courts (Cases No. 41 and 45). The decision of the Appellate Division of the Supreme Court of New York in *Plesch v. Banque Nationale de la République d'Haïti* (Case No. 7) should be noted as a remarkable illustration of the American practice on the law of confiscation: 'that the confiscation decree in question, clearly contrary to our public policy, was enacted by a Government recognized by us, affords no controlling reason why it should be enforced in our courts'. This is a statement which one would like to see affirmed by a higher American Court. From the point of view of English practitioners one of the most important decisions reported in this volume is one by the High Court of Australia. It deals primarily with jurisdiction over members of visiting forces, but discusses numerous aspects of international law. There will, no doubt, be some who will observe with regret that the present Chief Justice of Australia described

as 'without foundation' Blackstone's view that international law was adopted in its full extent by the common law and was part of the law of the land (Case No. 47).

In conclusion, this reviewer feels bound respectfully to raise the question whether it would not be advantageous if some of the reports included in the *Digest* were reduced in size. This applies, for example, to the decision of the Court of Appeal in *Re A Debtor* (Case No. 29) which was affirmed by the House of Lords at [1950] A.C. 186, and to a German decision (Case No. 17) which, in view of later German decisions, carries little weight. It may also be asked whether the student is assisted by a report of over nineteen pages of the decision of a Canadian Judge of first instance in *The Elise*, seeing that this was reversed by the Supreme Court of Canada by a decision reported on six pages only (Case No. 50). These questions do not in any way detract from the value of this publication, which is indeed by now undisputed and undisputable and is amply reaffirmed by the present volume.

F. A. MANN

Grotius Society Transactions for the Year 1952. Volume 38. London: The Grotius Society. 1953. xxiii + 170 pp. 25s.

The principal contributions to this volume of the *Transactions* are the proceedings of the International Law Conference of 1952, consisting of two important papers followed by discussion. The first paper, on 'The European Defence Community', was read by Professor Henry Rolin, who not only is Professor of International Law in the University of Brussels but was well known as a pioneer of the Council of Europe. Professor Rolin makes no secret of his lack of sympathy for the project of a European Defence Community. In particular, he contrasts it unfavourably with the European Coal and Steel Community. He is critical both of the proposed Court and of the Assembly, which he feels ought to have been the same as the Consultative Assembly of the Council of Europe, it being understood that when functioning as an organ of the European Defence Community the power of vote would be given only to the representatives of the six member States. The second paper at the Conference, on 'The 1951 Hague Conference on Private International Law', was read in part by Professor B. A. Wortley, O.B.E., LL.D., and in part by Professor G. C. Cheshire, D.C.L., F.B.A. Professors Wortley and Cheshire represented the United Kingdom at that Conference, which comprised lawyers of fifteen European countries and Japan, with a Yugoslav observer. Four draft Conventions were elaborated, on two of which Professor Wortley has something instructive to say. The first Convention is concerned with international contracts for the sale of goods, with the exclusion, however, of the capacity of the parties, the form of contract, the transfer of property, and the effect of sales on third parties, on which agreement was not found possible. The second draft Convention deals with Legal Personality, and shows 'the deep cleavage between Anglo-Saxon company law and the law of some continental States'. The fourth draft Convention, dealing with civil procedure, Professor Wortley thinks 'perhaps the most immediately practical', but he accords it passing mention only. The third Convention, on the recognition of conflicts between the law of nationality and the law of domicile, is expounded at some length by Professor Cheshire. This Convention deals with one aspect of the doctrine of *renvoi*—what is sometimes known as partial *renvoi*—and in particular the difficulty which arises when the country of a person's domicile adopts the principle of nationality and the country of nationality adopts the principle of domicile. The solution

given by the Convention is simple: 'every contracting State shall apply the internal law of the domicile' (Article 1). Among the merits which Professor Cheshire sees in this solution is that it will no longer be necessary for an English judge to take a forensic journey abroad in order to discover whether the doctrine of partial *renvoi* is accepted in the domicile. Professor Cheshire concludes his paper with some interesting remarks on the Hague Conference and on the disadvantages and handicaps under which he and Professor Wortley, the only two delegates from the United Kingdom, laboured.

Seven other papers were read before the Society during 1952, the first of which was by Dr. A. Farnsworth on 'The Residence of the Individual in Anglo-American Law', a subject of increasing importance in the field of both public and private international law. Dr. Farnsworth examines the legal principles inherent in such terms as 'resident', 'ordinarily resident' and 'domicil' as applied to an individual, first in English law and then in American law (where the term 'sojourn' occurs). Dr. T. Komarnicki, in a paper entitled 'The problem of Neutrality under the United Nations Charter', reviews the position of States, whether Members of the United Nations or not, in the event of a war, and the inability of the Security Council to exercise its powers owing to the use of the veto by one of its permanent members. He discusses the phenomenon of 'non-belligerency' both as a 'half-way house' between neutrality and belligerency and as a status based on ideological motives, a political term covering anything from traditional neutrality to assistance on an increasing scale to one of the belligerent parties. Dr. Komarnicki is led to the pessimistic conclusion that 'Neutrality does not provide, in our times, sufficient guarantees for the maintenance of territorial integrity and political independence in an age of power politics overruling considerations of international law.' Mr. Charles Reith's paper on 'International Authority and the Enforcement of Law' offers certain considerations of a speculative nature on the origin of police forces which may seem novel to many jurists.

'The Meaning and Scope of Article 38 (1) of the Statute of the International Court of Justice' (which provides that the Court may in appropriate circumstances apply to the cases before it 'the general principles of law recognised by civilised nations') is the subject of a penetrative discussion opened by the late Professor H. C. Gutteridge, Q.C., LL.D., in which Dr. Bin Cheng and Dr. W. Adamkiewicz took part. They studied the question by reference to reported cases of the International Court and the Permanent Court of International Justice and national courts, by analysis of the words of the Article itself and by examining some of the accepted general principles of law, their importance and their origin.

Mr. G. G. (now Sir Gerald) Fitzmaurice, K.C.M.G., LL.B., begins his paper on 'The United Nations and the Rule of Law' by defining the term 'Rule of Law' as 'the subordination of the will of individual States, in their dealings and transactions *inter se*, to the body of rules known and applied by international tribunals under the name of international law'. More specifically, he re-states the concept as 'the consideration and settlement of all issues that arise between States, or in international organisations, by reference to the rules of general international law and to treaty obligations . . . and . . . by the use of appropriate legal methods and procedures. . . .' He enumerates the provisions of the Charter—the Preamble, Article 1, Chapter VI, &c.—and the organs of the United Nations—the Court, the International Law Commission, the Legal Department of the Secretariat, and the Sixth (or Legal) Committee of the General Assembly—which are specifically concerned with law. He shows that the United Nations has been economical in its use of its legal organs; in one case only (the *Corfu* case) has it recommended States parties to disputes or differences of opinion to have recourse to the International Court. Sir Gerald concludes with a review of the relationship of law to justice.

He submits that justice is very seldom achieved by aiming at it: 'rather is it a by-product of the application of legal rules and principles', to the exclusion of 'politics and similar matters'.

Finally, 'Some Aspects of the Anglo-Norwegian Fisheries Case' are presented by Mr. R. O. Wilberforce, who was engaged in that case as a practising lawyer. Mr. Wilberforce regards the case as 'not merely an exercise in international law, but international litigation, and litigation of great practical importance'. He outlines the history of the conflict from the end of the nineteenth century onwards, the contentions of both sides, and the technical difficulties of delineating the limits of territorial waters around an indented coast. He gives us a glimpse of an expert from the hydrographic department of the Admiralty demonstrating to the Court, with the aid of blackboard and compasses, the British solution of the problem. But even with this demonstration and an explanation in 'very plain language' the Court failed to understand 'the very simple technical problem' and Mr. Wilberforce is driven to doubt the efficiency of the Court 'as an instrument for deciding questions of contentious litigation where issues other than purely legal issues are raised'. He comes to three interesting conclusions. First, that the majority judgments of the Court compare unfavourably in coherence and elegance with dissenting judgments, which are the work of one hand; second, that the Court is ill-fitted by its Constitution to handle complicated issues of fact where evidence has to be weighed; and third, that it is a pity that the Court did not take the opportunity to deliver 'a judgment on the uncertain subject of the law of fishery limits which would have been a real guiding mark for the future'.

A. B. LYONS

Reports of International Arbitral Awards. Volume V. Published by the United Nations. 1953. Obtainable from Her Majesty's Stationery Office, London. ix+611 pp. £2. 5s. od.

This useful series is continued by the publication of a fifth volume containing awards of Mexican Claims Commissions other than the United States-Mexico Commission (whose awards were included in volume iv). Accordingly, the present volume reproduces all the awards of the British-Mexican, thirty-nine awards of the French-Mexican, and one award of the German-Mexican, Commission. The form of presentation is the same as that used in the earlier volumes. In particular, the reader is provided with the text of the Conventions, with a bibliography (though, one suspects, this is sometimes a little arbitrary), and with cross-references to earlier reports (although, again, they do not seem to be complete seeing that, for instance, in the report of the *Pinson* case, which covers no less than 139 pages of the present volume, there is no reference to the *Revue Générale* of 1932).

The attempt at comprehensiveness has fortunately not precluded the Legal Department of the Secretariat of the United Nations which is responsible for the publication from deciding upon a measure of selection. Yet one cannot help feeling that the compilers could have been more radical in pruning their material. In a number of instances the text of the decision has been omitted, so that there remain only the names of the parties and a head-note. But it may be asked whether the head-note and, consequently, reference to the case could not have been omitted altogether. Thus no student is likely to derive benefit from the bald statement of the decision in *White's* case (at p. 289):

'Direct settlement of claim by agreement between British and Mexican Agents approved by tribunal.' On the other hand, in many instances decisions have been reported in full although they turn on the facts only and do not lay down any legal principle (see, for example, pp. 238, 240, 242, 294, 313). There is no doubt, however, that on the whole international lawyers will welcome this collection of awards.

F. A. MANN

The Year Book of World Affairs. Volume 7 (1953) and Volume 8 (1954). Published under the auspices of The London Institute of World Affairs. London: Stevens & Sons, Ltd. 1953 and 1954. xii+378 pp. £2. 2s. od. each.

Each of these volumes of *The Year Book of World Affairs* contains a dozen or so articles by writers, specialist in their subject, on world politics, international relations, or the history of current affairs. Two articles in the 1953 volume are of particular interest to international lawyers. Professor S. Engel, of the University of Tennessee, in a paper entitled 'The Changing Charter of the United Nations', expounds the interesting thesis that, like that of the United States Constitution, the text of the Charter forms only part of its framework; the Charter in action, like the 'living' Constitution, includes numerous constitutional practices, customs and interpretations adopted and developed since 'its inception'. Both documents contain provisions for their formal amendment, but the conditions for such amendment can be met only with difficulty. Yet both have proved flexible enough, in Professor Engel's submission, 'to be adapted to changing circumstances even without formal amendment'. Professor H. A. Smith presents yet another critical appreciation of 'The Anglo-Norwegian Fisheries Case', with which he deals under the headings 'Base Lines', 'Historic Bays', 'Practical Conclusions of the *Fisheries Case*', and 'Limitations of International Judicial Settlement'. Professor Smith then turns to consider the constitution and character of the International Court of Justice itself, comparing it with the tribunals of civilized States. He concludes unhelpfully that 'it is impossible to expect that any international tribunal, however it may be constituted, can function in the same way as the regular courts of a normal State'.

A higher proportion of the articles in the 1954 volume have a bearing on international law. As an Editorial Note explains: 'In view of the possibility of the 1955 General Assembly of the United Nations calling a General Conference of the Members of the United Nations on the Review of the Charter, it was thought timely in this volume of the *Year Book* to concentrate attention on the United Nations and, in a series of papers, to analyse some of its most important activities.' The series commences with a study of 'The Problems of International Government', by Max Belof. Three papers deal with the relationship with the United Nations of three of the Great Powers: Great Britain (by Mr. de Groot, of Durham University), the United States (by Professor Winkler, of Rutgers University), and the Soviet Union (by Mr. J. Frankel, of the University of Aberdeen). A pessimistic note is struck by Mr. L. C. Green in 'The Security Council in Retreat'—to wit, from unanimity. 'The Economic Work of the United Nations' is described by Susan Strange; and Mr. C. S. Toussaint, in 'The United Nations and Dependent Peoples', explains the working of the International Trusteeship System under Chapter XI of the Charter. In his study of 'International Law in the United Nations' Dr. Bin Cheng persuasively explains how far the rule of what he describes as

power politics has been modified rather than effectively suppressed, by the United Nations; how legal considerations are often casually dismissed as technicalities; and how organs of the United Nations frequently attempt *de facto* to revise the Charter by 'a spurious interpretation of its provisions'. Dr. Cheng is no less unfavourably inclined towards 'the new international law' as expounded by the International Court and the International Law Commission respectively. He finds that 'the record of international law in the United Nations is not a proud one' and fears that 'the continued neglect of international law in the United Nations . . . would only lower further its prestige which already is near its nadir'.

A. B. LYONS

International Economic Organizations. By C. H. ALEXANDROWICZ. London: Stevens & Sons, Ltd. 1952. xii+268 pp. 30s.

Professor Alexandrowicz deals in this book with the attempts at international economic co-operation. He treats these attempts as an historical sequence and begins with a review of the role of the Central Banks under the leadership of the Bank of England. He points out how by the end of the First World War the loss by Great Britain of her leading position in the financial world led to many problems in world economic adjustment. The United States, as the successor to Great Britain, did not continue the policy pursued by the Bank of England of aiding debtor countries. After mention of the position of national and international cartels, the author describes the attempts, both of a private and of an inter-governmental character, made in the inter-war period to deal with 'the Crisis'. He devotes a chapter to the International Commodity Agreements, of which the primary object was the management of surpluses and the control of price fluctuations. He also discusses the aims and organization of the economic International Public Unions established between the two World Wars, and with the Bank for International Settlements, the International Chamber of Commerce, and the International Labour Office. The second part of the work is devoted to a description of economic conditions since 1945. This includes a careful analysis of the development of the International Monetary Fund and the International Bank. Again, in pursuance of his method of examining proposals as well as achievements, the author analyses the main objectives of the Havana Charter, the International Trade Organization, and the General Agreement on Tariffs and Trade. Reference is made in some detail to the European Economic Organizations established to deal with the economic problems arising out of the Second World War. Finally, the author surveys the work of the Economic and Social Council of the United Nations. He points out how the subsidiary organs of the Economic and Social Council, such as the Transport and Communications Commission, are functional in character, while the European Organizations, such as the Economic Commission for Europe, have broader powers to deal with all economic problems. In this connexion he also discusses the Schuman Plan and the action taken by European organizations to deal with economic problems. His general conclusion is that 'no precise centre of direction appears above all the operating agencies', and that the 'Economic and Social Council is a general co-ordinating body inherently unable to become "the pivot of world economy".'

Although this work covers a wide field and should for that reason be welcomed as meeting to some extent the unsatisfied need for a comprehensive work on the legal aspects of international economic organizations, the general way in which Professor

Alexandrowicz deals with the subject is somewhat disappointing to the international lawyer. In his introductory survey the author states that the 'co-operation of law and economics are essential in the above considerations'. Later he repeats this proposition in relation to the Universal Postal Union, the International Labour Organization, and the International Monetary Fund. He says: 'In all these cases the interest of the international lawyer and of the international economist coincide, as the structure of the Organization is particularly essential for the performance of its functions.' Yet, despite this identification of interests, the author's viewpoint is primarily that of the economist. His main object appears to be to give an account of the problems existing in connexion with international economic planning, whether or not questions of international law are involved. For example, the author discusses at some length such specific subjects as the plans for an International Clearing Union and the problems connected with the international control of trade barriers. The discussion of legal problems is, on the other hand, somewhat cursory. Only a brief description is given of the International Labour Office. More particularly, no clear picture is drawn of the extent to which international law operates in this sphere.

The explanation of this essentially non-legal approach may lie in the author's acknowledgement in the Preface of his debt to the 'sociological approach to international problems and the use of the inductive method'. Throughout this book Professor Alexandrowicz emphasizes the importance of the sociological approach to international law and international relations. Thus, he describes the Central Banks in relation to the social background of the international business community. He states that the work of the Central Banks was quasi-organizational and 'habits of united action grew out of this common ground of international behaviour'. Similarly, in his consideration of the International Chamber of Commerce, he states that the National Committee 'may become a co-architect of a new social structure of world economy'.

The effect of this approach is perhaps to diminish the value of this work for those interested in the legal aspects of international organization. Even as a work of description its emphasis upon the economic and sociological aspects of the institutions with which it deals leads to the omission of details which are material to a lawyer's analysis of the same institutions. Where such details are provided, as in the case of the International Public Unions or the International Monetary Fund, no thorough attempt is made to draw from them conclusions of legal interest. The author frequently refers to 'quasi-organizational' structures without giving a definition of what is meant by this term.

Despite these criticisms, the volume will have some value for the lawyer. In the first place, it contains in a convenient form an analysis of the economic problems which underlie contemporary international economic organizations. Secondly, it contains much useful information upon the day-to-day working of the organizations which the lawyer cannot afford to ignore. There is, for example, a helpful description of the criteria by which the 'countries of chief industrial importance' in the International Labour Organization are determined.

RUTH GOLDSTEIN

General Principles of Law as Applied by International Courts and Tribunals.
By B. CHENG, Ph.D. London: Stevens & Sons, Ltd. 1953. li+490 pp.
£4. 4s. od.

In this work Dr. Cheng sets out 'to demonstrate the practical application by international courts and tribunals of various general principles of law recognized by civilized

nations'. The method which he adopts is to collect in four general classes a number of questions considered by international tribunals to the solution of which common principles appear either to be applicable or to have been applied and which for that reason may be grouped together. In this way he examines, first, under the head of 'The Principle of Self-Preservation', such questions as the expulsion of aliens, the treatment of alien property and the exercise of the right of self-defence. Part II of the volume, under the title 'The Principle of Good Faith', is concerned chiefly with good faith in the interpretation and performance of treaty obligations and with the theory of the abuse of rights. The third Part of the volume is devoted to 'general principles of law in the concept of responsibility', and includes a discussion of such questions as fault, measure of damages and causation. Lastly, Dr. Cheng examines 'general principles of law in judicial proceedings'.

With regard to the particular topics which he places under these heads, there can be little doubt that Dr. Cheng has produced a useful and valuable analysis of the principal arbitral awards bearing on the matter. This is so particularly in connexion with the treatment of alien property in Part I, of imputability in international law in Part III, and of judicial procedure in Part IV. For these reasons alone, Dr. Cheng's book deserves close study by and appreciation of all those concerned with the application of rules of international law. Beyond this, however, the merits of Dr. Cheng's volume must be a matter of controversy, not so much perhaps because his classification of topics may strike some readers as bold and others as arbitrary and artificial, as because the volume—which is described as being concerned with the application of general principles of law recognized by civilized nations—does not, upon careful reading, appear properly to satisfy this description.

The expression 'general principles of law recognized by civilized nations' is a term of art made familiar by the tradition of thirty years. That tradition has ascribed a distinct role to 'general principles of law'. They represent the source to which recourse is had when the rules of customary international law to be found in judicial decisions of either international or municipal tribunals or in the practice of States, fail to provide sufficiently explicit guidance for the determination of the particular issue under consideration. Essentially, general principles of law are a subsidiary source of law. That is not to say that as a source they are not important. Indeed, the very reverse is true, for in the element of flexibility which they introduce they exercise a vital and beneficial influence. In the application of general principles of law the task of the judge is essentially (though perhaps not theoretically) a creative one. The rule he applies is not one derived from precedent, but is deduced from, and represents a factor common to, the accumulated judicial experience of nations.

It is from this traditional use of the term that Dr. Cheng departs in two ways. In the first place, he identifies 'general principles of law' with 'general principles of *international* law'. Thus, in giving expression in his Conclusions to the approach which he has adopted throughout the volume, he says (at p. 390): 'It is of no avail to ask whether these principles are general principles of international law or of municipal law, for it is precisely of the nature of these principles that they belong to no particular system of law, but are common to them all.' It is difficult to agree with Dr. Cheng that it is of no avail to make the inquiry. Though it may be true that in their general aspects there may be principles common to international law and municipal law, it should not be forgotten that the purpose of recourse to 'general principles of law' is to discover in municipal law some technical rule of common application which will assist in filling a gap where the application of a more general rule of public international law cannot help. It is manifest that the general or, as they might be called, the 'common' principles of

municipal law so found are by no means necessarily identical with general principles of international law. Moreover, this identification of 'general principles of law' and 'general principles of *international* law' creates particular difficulties in those cases where parties to a contract which might otherwise be governed by municipal law endeavour to lift the contract out of the sphere of municipal law, by expressing it to be governed by 'general principles of law'. In doing so they do not intend to, and, indeed, they cannot, subject themselves to 'the general principles of international law'.

Secondly, Dr. Cheng departs from the traditional mode of employing general principles of law in the emphasis which he places upon the decisions of international tribunals. There is no doubt that in order to produce a balanced account of the rules of international law upon any particular topic, reference to international arbitral awards is essential. In relation, however, to general principles of law, reference to international decisions is required only to show the situations in which, and the technique by which, general principles have been employed. The title of Dr. Cheng's volume leads the reader to expect an examination of this character. In fact, Dr. Cheng does not meet this expectation of the reader and does not analyse the method by which international tribunals have employed analogies derived from private law. Instead, he groups together all awards which come close to stating or following any general principle—whether of municipal or of international law—without endeavouring to ascertain how or why these principles were applied. This approach may give rise to suspicion that in the author's opinion a general principle of law which does not find expression in an existing award of an international tribunal cannot properly be considered as a general principle at all. The acceptance of that view is bound to handicap the use in the future of general principles of law as a source of international law.

There is a further, though more general, comment which may be made upon the volume under review. It is difficult upon reading it to avoid a feeling of incompleteness and of a certain lack of balance in the use of judicial authorities. There is no reference in the volume to such general principles of law as those relating to the incidents of property, as, for example, whether there is a distinction between tangible and intangible property or between rights *in rem* and rights *in personam*. The notion of *fraude à la loi*, which plays some part in the law of nationality, both municipal and international, is not mentioned. In the section on derivative responsibility, where an attempt might have been made to deal in a comprehensive manner with the whole problem of agency in international law—a problem to the solution of which general principles of law could contribute greatly—the reader is left unsatisfied with a few remarks upon the effect of international representation on the question of State responsibility.

The impression of lack of balance is heightened by the failure of the author to distinguish between the importance of the various tribunals whose decisions he quotes. Thus in the section (at pp. 266–7) on Jurisdiction over Incidental Questions, Dr. Cheng gives precedence to a decision of the Hungaro-Serb-Croat-Slovene Mixed Arbitral Tribunal, while relegating to a footnote a reference to the *Corfu Channel* case. Even in a system where there is no hierarchy of tribunals because there is no formal doctrine of binding precedent, the International Court of Justice is generally regarded as being more authoritative than a mixed arbitral tribunal. Again, and perhaps more pertinently, it may come as a surprise to some to find that the separate Opinion of Sir Arnold McNair on the *International Status of South-West Africa*, which is regarded by many as being the outstanding example of the application of general principles of law by the present International Court, does not form the subject of a special discussion in the text; it is referred to only partially, and in passing, in the Conclusions.

Despite these criticisms, of which the most serious is admittedly the one most open

to argument, Dr. Cheng's work is an important and fully mature contribution to the literature of international law. There may be faults of method or of presentation, but they should not weigh too heavily in comparison with the service which he has performed by bringing together within these pages a mass of useful and otherwise not readily available material on the particular questions which he considers. For this service every practitioner—and there are many to whom 'general principles of law' are a matter of constant and practical application—will be indebted to him.

E. LAUTERPACHT

Human Rights as Legal Rights. By PIETER N. DROST. Leiden: A. W. Sijthoff's Uitgeversmij N.V. 1951. 272 pp. 18.50 guilders.

In this interesting monograph Dr. Drost concentrates rather on the historical development of human rights and on sketching the main features of a system for the future, disclaiming any intention to give a detailed study of human rights in international law. Nevertheless, references to international law recur constantly throughout the work. The author distinguishes between human rights and fundamental freedoms. According to him, the former are an intrinsic part of the province of law but require a favourable political, economic, and social climate for their consummation. The latter belong more to the fields of politics and economics, but need legal implementation for their effective existence. The lawyer is not 'the political, economic or social architect'; he comes on the scene at a late stage; his task as legislator is threefold: to define the rights of man, to allocate to these rights their proper place in the entire legal system, and to provide measures for their effective observance and enforcement. He has 'the vital task of bringing the moral rights and social demands of man within the orbit of positive law'. Dr. Drost sees no place in all this for natural law: for him it is positive law that will 'render the inalienable rights of man less alienable'.

In his historical survey he shows that human rights made their appearance in positive law comparatively late in the history of civilization—not before the eighteenth century; and, as 'a distinct set of rules within the law of nations', not before the Covenant of the League of Nations. At first, only States, and not individuals, were subjects of international law; the individual had no *positio standi in iudicio* in any dispute. But freedom of religion was pledged by the Christian European States in 1555 in the Treaty of Augsburg and again in 1648 at the Peace of Westphalia, and in the Treaties of Oliva of 1660, of Nijmegen of 1678, and of Ryswyck of 1697. The treaty protection of religious minorities was first undertaken in the Treaty of Kutchuk Kainardji of 1774, and appeared again in the treaties of the nineteenth century, from the Treaty of Vienna of 1815 onwards. Yet in none of these was the implementation of treaty provisions effected by supervision by international organs or the right of petition. The concept of supervision was first introduced by the League of Nations: the Council was the supervisory body for the minorities treaties of 1919-20 and the minorities clauses in the Peace Treaties of St. Germain, Neuilly, Trianon and Lausanne. Dr. Drost has found the first grant of the right of petition in the Geneva Convention of 1922 concerning Upper Silesia. He also describes the well-known practice of the Permanent Mandates Commission and the League Council of receiving petitions from private sources. However, he sees these petitions not as initiating proceedings to which the petitioner is a party, but as raising 'matters of international concern dealing with the obligations of a Mandatory Power versus the international community represented by the Council of the

League'. The right of petition, he points out, is itself a human right and is not limited to violations of human rights.

The modern position, since the reconstitution of the international community under the Charter of the United Nations, requires that the 'antiquated doctrine that the individual cannot be a subject of rights and duties in international law, should be thrown overboard'. The individual must derive his rights directly from positive law, that is, from treaties. This means that a treaty provision granting or relating to human rights may be in the nature of a '*stipulation pour autrui*'. But if, as Professor Lauterpacht has shown in Chapter 2 of his *International Law and Human Rights*, individuals can be the subjects of international rights if States so wish, what, it may be asked, becomes of the principle *pacta tertiis nec nocent nec prosunt*? It is no answer to say, as does Dr. Drost, that a State which has violated a human right embodied in a treaty which it has signed commits, first, a breach of contract *vis-à-vis* any other signatory State, and secondly, 'is directly responsible under international law in its modern and—it is submitted—correct interpretation to the individual injured in his own rights'. He treads on similarly controversial ground when he asserts, without fully justifying his own dicta, that 'Treaty law overrides contrary provisions of domestic legislation' and 'International law constitutes an independent source of law for the individual'. But he concludes that the ultimate goal of universal respect for human rights is to be found in a system of international implementation of human rights under international law. He examines the Charter of the United Nations, but finds that this does not form a legal basis of human rights although it 'lays down binding obligations which form the cornerstones of any future international system of human rights'. The Universal Declaration of Human Rights of 1948 (the text of which is given as an appendix to the book) is, according to Dr. Drost, not a code of human rights but 'an enunciation of the rights of man defined in common agreement as a compromise between conflicting ideas in modern society'. It is submitted that this is a just appreciation. The Declaration, of course, is not, and was not intended to be, a legally binding instrument, but its universality gives it some legal significance. Yet the principles set out in it have not been adopted in their entirety by any one country. Dr. Drost suggests, with some reason, that it was 'only because its wide contents did not constitute legal obligations' that the Declaration was adopted by almost all the States in the General Assembly. It defines human rights and leaves them to be enacted as legal rights in positive international law, namely, by international legislation and regional agreements and arrangements: but treaties there must be. Treaty law, then, is the only available source of international human rights, to the exclusion of anything in the nature of 'judge-made' international law; but the treaty law requires the sanction of 'compulsory enforcement on the international level'. The author devotes a Chapter to remedies for the violation of human rights and another to international implementation of those rights. He examines the existing machinery for sanctions, political and judicial, and comes, albeit not very convincingly, to the conclusion that the only practicable solution is 'a non-judicial system with quasi-judicial procedure', for example, international negotiation and conciliation. The right of petition is closely analysed, and distinctions drawn between the right of petition to municipal authorities and that to international authorities, between the *pétition vœu*—the expression of a wish the fulfilment of which is within the discretion of the petitioned authorities, and the *pétition plainte*, which asserts the violation of a right and demands satisfaction and redress. The human rights petition, according to Dr. Drost, combines elements of both. He recounts briefly the history of petitions to diplomatic conferences, to the League of Nations and to the United Nations and its organs, and pays tribute to the work of non-governmental

organizations. The author closely examines the right of petition in international law and canvasses the necessity of a right of this nature in an effective international system of human rights. From this, his reasoning leads to some bold conclusions such as 'The individual should be in the position to initiate international proceedings without any prior action before national authorities' and 'Special agencies with a semi-judicial function should be established to determine disputes on the violation of human rights between the individual and the State' in accordance with a procedure which he describes in detail and at considerable length. The author has been inspired by his experiences in the Division of Human Rights of the United Nations Secretariat, and his enthusiasm for his subject has notably coloured the language in which he presents it. The book contains a very full and useful bibliography but no index.

A. B. LYONS

Expropriation in International Law. By S. FRIEDMAN (translated from the French by I. C. Jackson). London: Stevens & Sons, Ltd. 1953. xv+236 pp. £1. 15s. od.

Dr. Friedman has shown much enterprise in undertaking a systematic treatment of this vast and controversial topic. If the result is not fully satisfactory, much of the fault must be attributed to the fact that he has attempted to treat in a comprehensive fashion one of the most vital topics in international law within the slender space of some 220 pages. In the circumstances it is hardly a matter for comment that his approach is in several respects inevitably superficial. Moreover, the author has not made an already difficult task easier by the form which he has given to his work. For he has chosen, in effect, to divide his examination of the subject into two parts, dealing in the first with the materials available as sources of rules, and in the second with certain problems relating to expropriation. The effect of this rather arbitrary division is to lead either to repetition or to omission of the precedents in the two parts of the work.

After a short introduction Dr. Friedman, in a Chapter entitled 'Expropriation in State Practice', examines in some detail the provisions in the constitutions and legislation of a number of States. His object is to ascertain to what extent these provisions display some common features: in relation to individual expropriation he finds none. The same conclusion—apart from the possibility that some acts may be classified as measures of 'nationalization' and others as measures of 'socialization'—appears to be reached in relation to general expropriation. Dr. Friedman does not in this part of the work examine any other forms of the practice of States, such as protests and diplomatic correspondence, nor does he attempt to draw from his survey any conclusions which might be of assistance to international lawyers. The result is that the value of this portion of the volume is restricted to the intrinsic, though limited, interest of an account of the principal movements of socialization and nationalization. Occasionally, however, useful and interesting facts come to the surface, such as that when the French gas and electricity industries were nationalized aliens received more favourable treatment by way of compensation than did Frenchmen.

There follows a Chapter on 'Leading Precedents in Expropriation', in which the author examines 'international judicial decisions, international practice, proceedings of diplomatic conferences and the deliberations of learned legal societies'. In his opinion the judicial precedents are inconclusive and it is necessary 'to look elsewhere for rules governing the institution of expropriation'. This conclusion may appear to be a rather

high price to pay for distinguishing out of existence such decisions as those in the *Chorzów Factory* case and the *Norwegian Ships* case. The same objection may be raised to a similar conclusion which Dr. Friedman reaches after his analysis of the provisions of the Peace Treaties after the two World Wars and other instruments such as the Convention of 1926 between Italy and Albania regarding Conditions of Residence and Business, in which express provision was made that expropriation might be carried out only on payment of 'just compensation'. Perhaps the most helpful part of this Chapter is that in which the author refers to the Conference on the Treatment of Foreigners held in 1929 under the auspices of the League of Nations.

In the second part of the volume, beginning with the Chapter on 'Expropriation and Legal Principles', Dr. Friedman at last begins to face the substantive problems of this subject, even though he approaches them in a rather unorthodox, unrelated and, for these reasons, confusing manner. The burden of this Chapter, in which such seemingly disparate topics as 'The Concept of Acquired Rights' and 'The Criterion of National Treatment' are touched upon, is to establish what for long has been little doubted, namely, that States have the right to expropriate foreign property. What really matters are the conditions under which this expropriation may take place. The remaining ninety pages of the book are devoted to an examination—inevitably of a cursory nature—of the mass of technical rules which surround the exercise by a State of the right of expropriation. As he moves rapidly over the field the author suggests that according to international law the State alone has the right to define what is or is not required by its own public utility. It is difficult to reconcile this opinion with that expressed in the award of the Arbitrators in *Administration of Posts and Telegraphs of the Republic of Czechoslovakia v. Radio Corporation of America* (*American Journal of International Law*, 30 (1936), p. 523, at pp. 531-4), to which Dr. Friedman does not refer. Again, the absolute distinction drawn by the author between rights of property and contractual rights is not one which will be easily shared by those concerned with the protection of rights acquired under concessions and similar contracts. Of the sections which follow perhaps the most satisfactory is that in which the author examines the position of shareholders in foreign corporations. No reference is made to the helpful article of Dr. Mervyn Jones in this *Year Book*, 26 (1949), p. 225, on 'Claims on Behalf of Nationals who are Shareholders in Foreign Companies'. However, this omission is not so surprising as the failure to refer at any point in the volume—and especially in the Chapter on Compensation—to Miss Whiteman's leading work on *Damages in International Law*. And it is in the Chapter on Compensation that Dr. Friedman expresses the rather controversial opinions that in relation to general expropriation aliens are not at present entitled to any greater compensation than nationals, and that in relation to individual expropriation 'it is not for . . . an international judge to impose a penalty for an unlawful act committed by another State'. This last observation accords little with the distinction drawn by the Permanent Court of International Justice in the *Chorzów Factory* case between the quantum of damages payable in the case of legal and that payable in the case of illegal expropriation.

The book under review does not purport to be a complete presentation of the subject. The author modestly states in the Preface that his object is 'to throw light on these turbulent problems'. This object he has certainly achieved. Moreover, he has performed a service by stimulating thought on a controversial and difficult subject.

E. LAUTERPACHT

The Law of the Air. By SIR ARNOLD DUNCAN MCNAIR. Second Edition by M. R. E. Kerr and R. A. MacCrindle, 1953. London: Stevens & Sons, Ltd. xxiii+500 pp. £3. 3s. *od.*

The first edition of this work was published as long ago as 1932. The editors in their Preface claim that none of the conclusions of principle of Sir Arnold McNair, Q.C., the author of the first edition, 'has in any way been invalidated by the passage of over twenty years', a notable claim which constitutes a deserved tribute. The science of aeronautics has made vast strides during the past few decades and the law governing aeronautical activities must needs develop rapidly; if it has not outstripped these conclusions of principle then their enunciation must be regarded as a major achievement. The work is described as an up-to-date textbook dealing with all points of principle relating to the law of the air and of aviation; the editors acknowledge the assistance of, among others, Sir Arnold McNair himself and the International Air Transport Association. The epithet 'up-to-date' is justified by a section (p. ix) headed 'Late Developments' which records such events as the Brighton meeting of the Economic Commission of the International Civil Aviation Organization in June 1953, and the ninth session of the Legal Committee of I.C.A.O. at Rio de Janeiro in August 1953, when certain drastic revisions of the Warsaw Convention of 1929 were recommended.

The scope of the work is narrower than a strict reading of the title would suggest: it comprises the law relating to the use of the air by aircraft—the 'aeronautical law' of England—to the exclusion of other uses of the air and the air space, as, for example, by the transmission of wireless waves, or, indeed, by rockets and other projectiles. It extends to the public international law of aerial navigation, but only, as the editors appear rather grudgingly to concede, because that law has 'materially conditioned the rules of English law'. Indeed, on another view, the law of the air is not so much international law as a collection of national laws contained in treaties, that is, it is almost entirely treaty law. In the first Chapter of this book is briefly outlined the history of the long series of Conventions which have been entered into by groups of States and which have for their object the international regulation of aviation, starting with the Convention of Paris of 1919. It is a minor ground of complaint that no mention is made of the first international agreement to regulate the use of the air in time of war, namely, the Hague Declaration of 1899 concerning Projectiles and Explosives Launched from Balloons, which was ratified by the signatory Powers to an extent greater than were many subsequent Conventions. From the point of view of completing the history of the topic, one misses also any reference to the International Conference on Air Law of 1889, and the International Committee of Aviation Law of 1907, both held in Paris. Since 1919, conferences and conventions have been legion, and those of later years have given birth to a rash of strange words formed out of initials, such as CIANA and CIAPA, CITEJA and CIPDA, which disfigure some of the pages of this book and works of a like nature—and will presumably do so increasingly in the future.

Under the heading 'The Freedom of the Air in General International Law', the international lawyer will be particularly interested in the three or four competing theories concerning State sovereignty over the air space over land, including internal and territorial waters, there set out. The conflict is obviously between a claim for absolute sovereignty, such as a State has, and needs for its own safety, over the seas adjacent to its coasts, and a claim that the air is free to all States alike, on the analogy of the high seas. The theory that has prevailed is that, 'subject to a mutual carefully safeguarded and easily determinable right of free entry and passage for non-military aircraft of

foreign countries', a State has complete sovereignty in its superincumbent air space to an unlimited height—the international law equivalent of the common law dictum *cujus est solum*, &c. The theory is incorporated in the first Article of the Paris Convention of 1919, where the High Contracting Parties recognized 'that every Power has complete and exclusive sovereignty over the air space above its territory . . . including the . . . territory . . . of . . . Colonies, and the territorial waters adjacent thereto'. Similar provisions are contained in the Madrid and Havana Conventions of 1926 and 1928 respectively, and the theory is reaffirmed in the Chicago Convention of 1944. (The development of this principle can to some extent be traced in the British Air Navigation Acts of 1913 and 1919. The former authorized the making of orders prohibiting the navigation of aircraft over 'the whole or any part of the coastline of the United Kingdom and the territorial waters adjacent thereto', while the latter made it lawful to regulate air navigation over 'the British Islands and the territorial waters adjacent thereto'. Finally, the Act of 1920, consequent upon the Paris Convention of the previous year, declared unequivocally that 'The full and absolute sovereignty and rightful jurisdiction of His Majesty extends, and has always extended, over the air superincumbent on all parts of His Majesty's dominions and the territorial waters adjacent thereto'.) But so rigorous a doctrine of sovereignty, however attractive in theory, must be mitigated by 'States mutually affording each other rights in their own air space'. That practical consideration inspires the Conventions of Paris and Chicago and in particular the International Air Transport Agreement, where the 'five freedoms' are proclaimed. These, however, proved too drastic for some of the nations represented at Chicago, who contented themselves with two only of them—granting to scheduled air lines the privilege to fly across a State's territory without landing and the privilege to land for non-traffic purposes. Other freedoms, essential for the operation of commercial air transport, are obtainable only by virtue of private agreements with the States concerned. The editors point out that most of the fundamental questions of international air law are still, more than thirty years after the Convention of Paris, 'far from being answered with one voice'. There are, moreover, many technical problems which require to be solved before there can be any hope of a really satisfactory general convention. In the meantime, to fill up the many interstices in the great network of bilateral and multilateral treaties which already exists, resort must be had to customary international law of remarkable paucity. It is, for example, summed up in one paragraph (§ 197e) of the current edition of *Oppenheim*. It may be that the corpus of customary international law is susceptible of enlargement, but the editors of this work have expressly dissociated themselves from such a task: their endeavour is to state the law as it is rather than, as it seems to them, it logically should be; although they say that they have permitted themselves occasionally 'to look into the future and hazard a few suggestions', those suggestions are made in connexion with topics other than public international law. There is no speculation, for example, on the question whether any special rules would govern flight through the stratosphere or that part of space where there is no longer air and where the vertical jurisdiction of a State might be thought to have reached its vanishing point.

In Chapter 5, which is headed 'Jurisdiction and Choice of Law', the relevant rules of conflict of law are canvassed, and two important questions are examined: (1) the determination, in English law, of the country whose law is to govern the acts of persons in and events, such as crimes, torts, collisions, legal transactions, births, deaths, and marriages, happening in, to or about an aircraft; and (2) if that country be England, whether English common law or the law maritime is applicable to the facts under consideration. The opinion expressed in the first edition of this book, that aircraft have not reached

the position accorded in private international law to ships, has not yet been invalidated. English courts prefer to treat aircraft as '*sui generis*', nor have they expressly considered the legal status of aircraft in conflict of laws. Section 32 (5) of the British Nationality Act, 1948, provides that '*for the purposes of this Act*'—which must surely mean, so far as this country is concerned—a person born aboard a registered ship or aircraft shall be deemed to have been born in the place in which the ship or aircraft was registered; and to that extent the position of aircraft has been statutorily assimilated to that of ships. As regards marriages contracted in an aircraft, the editors come to the conclusion that if the aircraft is at the time of the ceremony on or over the high seas, 'it is only . . . by virtue of the personal law of at least one of the contracting parties' that the marriage can be valid. 'There can be no *lex loci*.' It seems to the present reviewer that having regard to the high speed at which modern aircraft travel—and the higher speeds at which they seem likely to travel—although the dictum quoted is a truism, it may often be difficult to decide whether a marriage or any other legal transaction has been in fact performed over the high seas or over territorial waters or over dry land. That circumstance holds possibilities of interesting forensic arguments in the future. But, as the editors point out, urgent need exists for some international agreement on questions of conflict of laws and jurisdiction arising out of aerial navigation; their own predilection is for reference to the law of the flag rather than to the changing geographical position of aircraft at different moments in their flight.

Appendix 1 provides an historical account of the maxim *Cujus est solum, ejus est usque ad coelum et ad inferos*, which, read with Chapter 2, must be almost exhaustive. The remaining five Appendixes usefully give the texts of (2) the Chicago Convention on International Civil Aviation, 1944; (3) the Civil Aviation Act, 1949; (4) the Carriage by Air Act, 1932; (5) the Carriage by Air (Non-International Carriage) (United Kingdom) Order, 1952; and (6) the General Conditions of Carriage employed by the British Air Corporations and other air transport undertakings. The book is well produced and of pleasing format, the printed page being refreshingly free from variety in type faces and multiplicity of cross-headings. The index appears to be both accurate and comprehensive. The work will be a useful and valued addition to the library of both the practising and the academic lawyer.

A. B. LYONS

The Legal Aspect of Money. By F. A. MANN. Second edition, 1954. Oxford: at the Clarendon Press. xxxvi+488 pp., with index.

This new edition of an admirable book will be very welcome to the profession. Its importance was generally recognized when it first appeared immediately before the outbreak of the Second World War, and the new developments in the legal aspects of money which have been caused by the economic difficulties which stemmed from the war are of such importance that even the succinct account which Dr. Mann gives of them has added substantially to the size of his book, and might even be thought to have affected its balance. The author himself in his Preface describes it as a 'new book', which, in view of his eight new chapters, is an understandable view. However, they are on the whole short chapters and much of the argument in them depends on the application and development of the general principles so well set out and discussed in the earlier part. In the result the book retains its distinctive character and individuality while it gains from its additional comprehensiveness.

Dr. Mann's book is still the only English textbook on its subject, which is perhaps an indication of the difficulties involved but is more probably due to the fact that within the municipal area in which most lawyers write money presents few practical problems, even at the present day—it does, of course, raise matters of intense jurisprudential interest, and it is puzzling that these should have been but little examined until very recent times, even on the Continent, where such topics are usually more fully discussed. The truth is that when international conditions are reasonably stable the legal aspects of money are seldom much argued in courts. It is the violent upheavals of widespread wars, and particularly of the intense and uneven inflations to which they give rise, which set up stresses and strains which lead to disputes and litigation. These conditions persist long after declarations of peace and lead to new monetary arrangements, particularly among commercial men, and these in their turn are often a source of misunderstanding and give rise to still other problems which call for judicial solution.

And, of course, it is in connexion with international commercial dealings that such arrangements are chiefly necessary so that the mass of the litigation with which the courts become occupied falls into the domain of Conflict of Laws. It is significant that when during the period between the wars English lawyers began to be busy with these matters they were always driven back in their search for authority to decisions given during, or arising out of, the conditions brought about by the Napoleonic wars, for these approximated more nearly to those arising after 1914 than anything which happened during the intervening period. And in reading this book it is interesting to note how frequently these old decisions are referred to.

The chapters on this aspect of the subject are therefore, from a practical point of view, the most important in the book and indeed, with cognate chapters on such matters as 'The Nominalistic Principle, its Scope, Incidents and Effects', take up about half its total volume and comprise Part II under the heading of Foreign Money Obligations. Although these matters are on the whole well treated in the modern general textbooks on Conflict of Laws which are such a feature of recent legal literature and have, for example, given occasion for extended and valuable rewriting in the new edition of Dicey's *Conflict of Laws*, Dr. Mann's clear, closely reasoned, and well-documented exposition seems to me to be quite magistral in its quality. Those chapters, although they have been brought up to date, remain substantially as they were in the first edition of which they formed the core, and I think it is possible to trace the influence of the views expressed in them in more than one of the decisions come to in this type of case since that edition appeared in 1938. If Dr. Mann has a fault it lies in a tendency to exaggerate which appears from time to time in this book. For example, at p. 58 he says that 'in the last resort money becomes capable of discharging all obligations'. This is certainly an overstatement, and indeed it is because the common law remedy of monetary compensations cannot discharge certain obligations satisfactorily or, in some cases, at all, that we have in English law our valuable system of equitable remedies. An exceptionally interesting economic legal discussion occurs at pp. 51 ff. on the subject of whether the purchase of foreign exchange is legally the equivalent of the purchase and sale of a commodity, as a form of barter, as indeed the word 'exchange' signifies, and it would be interesting to explore whether this does not give a better basis than that of sale, which even in Dr. Mann's persuasive exposition is not free from difficulties.

Part I on 'The Legal Problems of Money in General', on the other hand, deals with what one might call the philosophy of the subject and is particularly valuable because it covers a good deal of ground which is common to both legal and economic science. Writing of this kind, especially of real quality, is so rare that Dr. Mann's pages make one realize what an opening there is in other branches of law for similar work. Although

his reading in monetary theory is wide and shows understanding of the economist's viewpoint, Dr. Mann's approach to his problems is dominated by the lawyer's outlook, and although this is as it should be in a legal work, one sometimes has the feeling that the treatment is rather narrow.

For instance, Dr. Mann is a convinced protagonist of the State theory of money which is closely bound up with nominalism, and the first part of his book is a great deal taken up with the exposition of this view and its application to legal monetary problems. The argument is convincing, but as a working theory its edges are too hard. What has been called the 'societary theory of money', under which anything which is treated as money in society is properly to be regarded as money, is no doubt theoretically fallacious from the strict legal point of view, but it does, of course, work to a surprising degree in practice and has been applied by the courts on occasion (when, as Dr. Mann thinks, they 'fell into error') and has even been forced by events upon the legislature. Lord Mansfield's 'currency theory' of the negotiable instrument has had a profound and lasting effect upon the law, and eventually the State took over the bank note from the commercial world and gave it the impress of its authority, but in doing so it was only accepting a hard business fact with which lawyers had already come to terms.

Dr. Mann is not unaware of these matters, but he rather strangely pushes them to the periphery of his discussion, and indeed sometimes appears to be a little insensitive to the close interconnexion of legal money and what has sometimes been called 'bank money'. He tends to place them in water-tight compartments. A small illustration of this appears at p. 11 where it is stated that 'a bill of exchange may not, but a banknote may be reissued after payment in due course', the point being to underline the difference between State money and mercantile money. But, of course, this was true, as far as it is true at all, before bank notes were taken over by the State. The difference really depends on the terms of the promise or obligation of payment: the bank note, being payable on demand, is susceptible of repeated reissue, but the ordinary commercial bill, being payable after date, is not normally speaking susceptible of reissue. Should it exceptionally be paid before its due date it may be, and occasionally is, reissued; for payment to operate as a complete discharge must be made at or after maturity (*Burbidge v. Manners* (1812), 3 Coup. at p. 194).

Dr. Mann is, of course, aware of the importance of commercial usage for the establishment of negotiable currency in English law, as is shown by his discussion of *Picker v. London and County Banking Co.* (1887), 18 Q.B.D. 515, at p. 145, where he points out that 'foreign money is not necessarily negotiable in England'. True as this is, the discussion might well convey a wrong impression to a reader who was not familiar with the line of cases under which various foreign State and also mercantile bonds have been held part of the negotiable currency of the English market. These cases—of which *Goodwin v. Roberts* ((1875), L.R. 10 Ex. 351) is the leading exemplar—are so well known that it is a little puzzling to find no reference to them in this work.

This part of the book, though personally I find it of the greatest interest, will probably not make such an appeal to international lawyers as will the later, and particularly the new chapters. I am not competent to discuss these, though I have read them with much interest. Part III deals with Exchange Control and Valuation of Foreign Currencies. It gives a clear and succinct introduction to an exceedingly complicated subject which is a *terra incognita* to most working lawyers other than those employed in the legal departments of banks and a few specialists in private international law. Unfortunately, and indeed quite inexcusably, the Exchange Control Authorities do not make available to the legal profession the notices which they issue to the banks for the purpose of making clear the policy which is being followed at the moment, so that, as

Dr. Mann says, in respect of any actual point of difficulty it is almost always necessary to consult a bank officer, who, not being a lawyer, might quite likely give erroneous advice.

Perhaps the most interesting discussion in this part of the book is that on the effect of exchange control upon contractual obligations, which is dealt with in Section V of Chapter XI and is undoubtedly 'a matter of some difficulty'. Dr. Mann's acute analysis brings to light some surprising anomalies, and it is to be hoped that those in control are paying attention to what he says.

The problems arising from the effect of exchange control upon property rights, and particularly upon their transfer, are exceptionally intractable. This is well brought out in the leading case of *Kahler v. Midland Bank*, [1950] A.C. 24, which gave rise to much difference of judicial opinion and has been strongly criticized by some of the textbook writers. Dr. Mann's views about it are fairly well known, and in his discussion of it here he described it as 'disastrous'—indeed, it is a refreshing quality of his work that he is always ready to criticize questions of public policy arising from the comity of nations which are much wider than the rather technical grounds on which the point was decided.

In Part IV Dr. Mann deals with the public international law of money. When the major commercial States entered upon the Bretton Woods Agreement to establish an International Monetary Fund, money, which up till that time had played an insignificant role in the repertory of the international lawyer who had had to concern himself with little beyond the currency problems of invaded territories, began to acquire a new importance. Dr. Mann, who suggests that the field was all the time richer in material than had been suspected, himself contributed an important article to this *Year Book* in 1949, and the present chapters are based upon what he then wrote. In it he raises a number of important points, many of which he is content to indicate rather than discuss, such as its reconciliation with the numerous existing treaties relating to rights of property. The implementation of the Bretton Woods Agreement by the various States who are parties to it gives rise, as might be expected, to interesting problems in private international law as well as to possibilities of disputes in the international field, and it is significant that in Part III of this book Dr. Mann often has cause to refer to the Agreement. It would certainly seem that these new arrangements for the international control of money, rigid as they must seem to the old-fashioned economist, have at any rate had the good effect of introducing a degree of stability into the international monetary market. The tiresome and difficult disputes over the constructions and application of gold clauses which took up so much judicial time before the war in the courts of most commercial States, and which occupy Dr. Mann for the whole of his important fourth chapter and in other significant sections of his book, seem to have disappeared from the legal scene as if by magic since the end of the war. Internally some countries where, after the war, the monetary system was particularly unstable, have had to cope with the problem of gold or index clauses, and in Germany the Allied control made them illegal, but by and large the International Monetary Fund has succeeded in maintaining sufficient stability to make recourse to the gold clause method of doing so unnecessary.

Moreover, it may be that the Bretton Woods Agreement will enable the nations to evade the important questions as to the measurement of the value where there are treaty obligations in respect of monetary payments. Or, as Dr. Mann himself puts it, is there a sort of implied gold clause in all treaty obligations of a monetary character? So many treaties contain express clauses of this kind that the practical importance of this problem is not so great as might at first sight appear.

In an Appendix Dr. Mann has collected important judgments given in a number of unreported cases which have been heard in the English courts. It remains only to say that, while the volume is attractively produced, it contains rather more compositors' errors than is excusable in a book published by the Oxford University Press. To mention a few which I have noticed, at p. 48, footnote 5 appears as 8, at p. 413, line 22, 'currencies' should read 'conversion', and at p. 458 something has gone wrong with the apparatus of quotation.

CHORLEY

The Continental Shelf. By M. W. Mouton. The Hague: Martinus Nijhoff. 1952. 366 pp. 24 guilders.

This book is the published version of the thesis which was awarded the Grotius Prize of the Institute of International Law in 1952. The subject set for the prize was 'A critical study of the juridical position of the Continental Shelf and of the questions concerning the utilization of the sea covering it, and of its soil and subsoil, beyond the external limits of territorial waters'. The author, a Captain in the Royal Netherlands Navy as well as a Doctor of Law, explains in the Introduction 'two peculiarities which may give rise to criticism if not explained beforehand'. The first 'peculiarity' consists in frequent references to scientific works on geology, geography, oceanography and marine biology; the second in extensive quotations from governmental decrees and proclamations, the minutes of the International Law Commission, and the works of other international lawyers. These 'peculiarities' may in places make the book less readable, but they do not make it less useful. The quotations from the scientific writers are particularly interesting, because there can be no doubt that the exploitation of the resources of the continental shelf presents the world with a problem which can only be solved by co-operation among lawyers and scientists on the technical level as well as among Governments on the international level. Captain Mouton's book is the more interesting because in many matters his suggestions—and the book is refreshingly constructive—deviate from the direction in which the growing international law on the subject appears to be moving, so far as can be judged from the Reports of the International Law Commission and the practice of Governments. Thus, whereas at any rate some Governments have seen fit to connect the problem of the continental shelf with the problem of fisheries, Captain Mouton opposes this tendency. Illustrating his case with a wealth of scientific detail—which to the layman at any rate seems most convincing—he shows that 'the continental shelf is very often a place where an abundance of fish is found, but it is not the only place and hence it should not be made into a criterion for delimitation of rights concerning fisheries'. The abundance of fish in a given area appears to depend not so much upon the existence of a shelf as on the presence of 'floating flora', or phytoplankton, made possible by conditions of the water known as convection and upwelling, these conditions being found normally, though not always, near the coast. In thus separating fisheries in general from the continental shelf, Captain Mouton is in agreement with the International Law Commission. But, in wishing to go farther and separate even sedentary fisheries from the shelf, he differs from the solution proposed, after some hesitation, by the Commission.

On the whole, Captain Mouton's approach resembles that of Gidel when the latter wrote *Le Droit international public de la mer* in 1934. Like Gidel, Captain Mouton finds sedentary fisheries incompatible with the freedom of the seas, so that he would limit them to historic cases. Like Gidel also, Captain Mouton would subject the sea bed as a

whole to the same régime as the high seas, whereas the International Law Commission appears to favour drawing a distinction between the high seas, on the one hand, and the sea bed and the subsoil, on the other hand. Captain Mouton would subject the subsoil only to a separate régime, and possibly the most interesting chapters in the book are those in which he sketches the outline of such a régime, based upon the principles of continental mining law. He disputes the theory—which many now regard as accepted customary law—that the continental shelf vests *ipso jure* in the coastal State, and suggests that all necessary exploitation can take place within the framework of the utilization of the high seas (including the sea bed), on the one hand, and a right of eminent domain over the resources of the subsoil, on the other hand. It is possible that an approach along these lines would be more scientific and would lead to a more equitable solution than that which most Governments appear to favour. Captain Mouton, however, puts his suggestions forward modestly and not as a panacea. Indeed, he frequently stresses the need for an international conference. If such a conference were ever to meet, it would certainly be much indebted to Captain Mouton, who is to be congratulated on showing how gainful can be the collaboration between international law and other sciences and how, in particular, the conclusions of the jurist can be greatly strengthened as a result of such collaboration.

D. H. N. JOHNSON

The Geneva Convention of 12 August 1949. Commentary published under the general editorship of M. JEAN S. PICTET (translated from the original French). Volume 1, *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. Geneva: International Committee of the Red Cross. 1952. vi+466 pp. Swiss francs 15.

In the Foreword to this work the International Committee of the Red Cross expresses the hope that 'this Commentary will be of assistance to all who, in Governments, armed forces, and National Red Cross Societies, are called upon to assume responsibility in applying the Conventions, and to all military and civilians, for whose benefit the Conventions were drawn up'. That this hope will be fully justified there can be little doubt. M. Pictet's monograph will probably for a long time be the standard guide to the Geneva Convention of 1949 relating to the Wounded and Sick.

The *Commentary* has in the main been prepared by M. Pictet, the Director for General Affairs of the International Committee of the Red Cross. He has had the benefit of the assistance of MM. Siordet, Pilloud, Schoenholzer, Wilhelm, and Uhler, all of the International Committee, for the preparation of the work on particular articles. Thus we are indebted to M. Pilloud for his commentary on the important Articles 49-52 dealing with the repression of abuses and infractions of the Convention (pp. 351-79). The authors also inform us that the present volume owes much to the studies of the late Paul des Gouttes, the former Secretary-General of the International Committee and the commentator on the Geneva Convention of 1929 relating to the Wounded and Sick. They have, moreover, in a short introductory survey of the history of the Red Cross and the Geneva Conventions, paid a graceful tribute to one of the greatest of their compatriots. 'Credit is due', they say on p. 10, 'to Jean Jacques Rousseau for having in a celebrated passage of the "*Contrat Social*" expressed in clear and definite terms the standards which are at the basis of the Geneva Conventions and the Laws of War.'

The plan of the work is practical and fully consistent with the needs of the subject. The introductory survey is followed by a commentary on the Preamble and each of the sixty-four Articles of the Convention and the thirteen Articles of the Draft Agreement relating to Hospital Zones and Localities which forms Annex 1 to the Convention (pp. 17-430). The task of the reader has been simplified by the setting out side by side of the comparative texts of the Wounded and Sick Conventions of 1929 and 1949 (pp. 436-62). As, inevitably, part of the commentary is devoted to the points of departure and extension between these two Conventions, their comparative texts are indispensable for reaping the full benefit from the commentary. Finally, there is a short but useful bibliography, divided into three parts: (A) Basic documents employed for drafting the Conventions of 1949; (B) principal publications concerning the first (i.e., the Wounded and Sick) Geneva Convention of 1949; and (C) principal works consulted with reference to the Geneva Conventions of 1864, 1906, and 1929. This last division includes the work of Paul des Gouttes on the Geneva Convention of 1929. As this *Commentary* was published in 1952 its value may be enhanced by referring to the monthly publications of the *Revue Internationale de la Croix Rouge* and their English supplements. The authors of the *Commentary* have contributed articles on the Geneva Conventions to the *Revue Internationale*, where they have expanded the views expressed by them in the *Commentary*.

The commentary on each Article tends to conform to a distinct pattern, which involves an historical review of the analogous provisions in the earlier Geneva Conventions, particularly those in the 1929 Conventions, the experience gained in the Second World War, the transactions which led to the 'Stockholm text' prepared by the Red Cross in 1948, and the deliberations of the governmental delegations at the Diplomatic Conference at Geneva in 1949 that led to the present text of the Article in question. When to this meticulous and careful analysis of the historical process is added a consideration of the practical tasks involved in alleviating suffering both during and after battle, the result of the commentary is to convince the reader that humanitarian principles and ideas can be translated into practical legal and administrative provisions. It is the peculiar *métier* of the authors that the same ardour which makes them the champions of humanitarian principles also makes them the painstaking expounders of practical rules that are to live and operate in the context of battle and its aftermath.

The successful operation of this Convention has not been entirely left to the goodwill and compassion of the Contracting Parties. Further methods of enforcement are enshrined in this and the three other Geneva Conventions of 1949. Of these methods perhaps our attention is first caught by the stringent requirements of Article 7 that the wounded and sick, medical personnel and chaplains 'may in no circumstances renounce in part or entirety the rights secured to them by the present Convention'. There could hardly be a clearer instance of the conferring of legal rights on individuals as opposed to the States who become parties to the Convention. This Article, as the Commentators point out (p. 78) is entirely new and has no counterpart in the Conventions of 1929. There can be little doubt in the minds of those conversant with the war crimes committed in the recent war that this Article is designed to emphasize both that legal rights under the Convention are conferred on individuals and that no form of renunciation, by pressure or otherwise, will be effective. This Article was not accepted at the Diplomatic Conference of 1949 without a struggle. The delegates were aware that 'the absolute character of the rule drafted might entail for some persons what one delegate termed "unfortunate results"'. It adopted the rule, because it seemed to safeguard the interests of the majority' (p. 80).

In order that the prohibition against renunciation of rights may operate it is of vital

importance that the holders of these rights and those subject to the correlative legal duties should know thoroughly their nature and content. Article 47 of the Conventions has now made it incumbent upon States who are parties to them to undertake in peace and in war to disseminate the text as widely as possible and to include the study thereof in their programmes of military and, if possible, civil instruction so that the principles may become known to the entire population. In the course of war crimes trials after the Second World War prosecutors found time and again that accused officers and civilians holding high appointments were ignorant of the provisions of the Geneva Conventions of 1929. German Generals and senior Staff Officers vehemently denied that the Conventions were included in the curriculum of their military studies.

Equally important are the enforcement provisions in this and the other three Geneva Conventions of 1949, namely, the four Articles 49-52, relating to penal sanctions, grave breaches the responsibility of the Contracting Parties, and the procedure of inquiry. As these common Articles are amongst the most significant Articles of these Conventions the commentary upon them is of particular value and interest. Although this first volume of the *Commentary* relates solely to the first Geneva Convention, we have in this aspect a commentary on all four of the Conventions.

The success or failure of these Conventions in any future armed conflicts will depend, in large part, upon the successful operation of the provisions governing the repression of abuses and infractions. Reference to the Final Record of the Diplomatic Conference of Geneva confirms the impression that this set of Articles was considered and debated by the national delegations separately from the main corpus of the Conventions. This, it is suggested, was unfortunate, for it has led to uncertainties, particularly in the case of the Convention relating to the Protection of Civilians. In their anxiety to avoid the subject of war crimes, the delegates at the Diplomatic Conference in 1949 rejected a draft Article prepared by four Government experts invited to Geneva in 1948. This draft Article provided a rule for the responsibility for criminal acts done pursuant to municipal law or in obedience to orders. This rejection is to be deplored, for the draft Article is perhaps the most successful attempt yet made to combine justice and lucidity in the statement of a rule on this controversial topic. The draft Article, together with an account of its fate at the Diplomatic Conference, will be found on pp. 359 and 360. One striking feature of it does not seem to have attracted the attention of the commentators. The rule as framed places *upon the prosecution* the onus of proof that, in view of the circumstances, the accused had reasonable grounds to assume that he was committing a breach of the Convention. It will be appreciated that such burden of proof may well be, and frequently is, difficult to discharge; if the court has a reasonable doubt upon the matter it will, under the Anglo-American legal system, acquit the accused.

This review may fittingly end with a short reference to the provision in the Convention relating to trial and extradition of those accused of 'grave breaches of the Convention'. The commentary on this provision (Article 49) contained on pp. 362-70 will repay close study. As a matter of detail it may be pointed out that the reference, on p. 302, to 'the obligation to search for any person accused of violation of the Convention and the obligation to try such person or, if the Contracting Party prefers, to hand him over for trial to another State concerned', is not entirely accurate. Article 49 imposes those stringent obligations only in relation to persons accused of committing 'grave breaches' of the Convention, and not to 'any person accused of violation of the Convention'. Article 50 defines 'grave breaches', and, as the commentators make clear on pp. 367-8, there are many infractions of the Convention which are also serious but which are not grave breaches. Here, it may be inadvertently, lies one of the real weak-

nesses of the Convention, particularly when it is considered in conjunction with the obligation imposed by the second paragraph of Article 49 on the Detaining Power to try an accused person or to extradite him to a State making out a *prima facie* case. This obligation, rightly described by the commentators as based on the principle *aut dedere aut punire*, will apply only in the case of grave breaches. The limitation upon the effective judicial sanctions which flows from this defect needs no elaboration. Frequently the accused, charged with a violation not amounting to a 'grave breach', is held by one State while the evidence against him is located in another State. If there be no obligation to extradite on the making out of a *prima facie* case by that latter State, then in the majority of cases the course of international justice will be obstructed—a phenomenon only too frequent in the years following the end of the recent war.

Tribute may be paid to the excellence of the translation from the French. In some 435 pages of closely reasoned and technical material one is rarely conscious of any obvious renderings from the French. A work of such a high order of excellence can only be begotten of the devotion which the authors have for their subject. This devotion finds a striking illustration in the very first sentence of the Introduction (p. 9). The authors describe to us the climate in which this work was prepared when they state: 'The Geneva Conventions are inseparable from the Red Cross, in their historical origin as in their living reality.' All concerned with these Conventions and with the advancement of the humanitarian ideals implicit in them and in the law of war as a whole will eagerly await the appearance of the other Commentaries yet to come on the Geneva Conventions of 1949.

G. I. A. D. D.

Internationales Konfiskations- und Enteignungsrecht. Beiträge zum Ausländischen und Internationalen Privatrecht. By IGNAZ SEIDL-HOHENVELDERN. Berlin: Walter de Gruyter & Co.; Tübingen: I.C.B. Mohr (Paul Siebeck). 1952.

The literature on the subject of confiscation is vast, and the attempts to solve by traditional methods of legal interpretation problems which do not easily fit into the framework of any civilized system of law have been as numerous as have, unhappily, been the legislative measures enacted by many States in violation of rights of private property. Among these attempts at solutions this book stands out as a very important contribution indeed. The author has delved deeply into the case law of European countries and the United States of America and has thus ensured treatment of the subject on the widest possible comparative basis. The jurisprudence of international tribunals has perhaps not received all the attention it deserves. On the other hand, important as some of that jurisprudence undoubtedly is, in the vast majority of cases it is the case law of municipal courts that is ultimately of more immediate concern to those who suffer the consequences of confiscation of property.

At the outset the author draws a distinction between confiscation and expropriation, the former being defined as acquisition (or purported acquisition) of property without payment of adequate or equitable compensation, and the latter as acquisition against payment of such compensation. This distinction, though perhaps not very happily phrased from a linguistic point of view, is undoubtedly necessary and generally accepted as forming the basis of any inquiry into this branch of the law. At the same time it

raises as many problems as it attempts to solve, as is only too evident from the Report of M. de La Pradelle to the 1950 Session of the Institut de Droit International, which made a somewhat different distinction, yet in its essentials one as fundamental as that made in the book under review. When is compensation adequate and immediate, and does it remain so if subjected to prohibitive taxes or onerous exchange control laws? These are some of the questions the author attempts to answer. Having defined the concepts of confiscation and expropriation, the author proceeds to examine, in the first instance, the extraterritorial effect of confiscation in relation to property which at the time of confiscation is situate within the territory of the confiscating State. Such confiscation, subject to overriding considerations of public policy, he regards as vesting a title valid both within and without the borders of the confiscating State. Conversely, he regards as invalid confiscation or purported confiscation of property situate outside the territory of the confiscating State at the time of confiscation. Nobody would wish to quarrel with these general conclusions, but it is precisely at this stage that the real difficulty begins. When do overriding considerations of public policy preclude the application of the general principle concerning the validity of acts of confiscation of property within the jurisdiction, and what is the *situs* of property in any given case? The author himself points out that there are as yet few decisions which have invoked public policy in order to defeat the claim to recognition of foreign acts of confiscation concerning property situate in the territory of the confiscating State (at p. 48). The reluctance of courts to accord to the concept of public policy its rightful place is perhaps best illustrated by the case of *Bernstein v. van Heyghen Frères S.A.* (1947), 163 F. (2d) 246, in which the purchasers' lack of *bona fides* might well have been assumed in view of the abnormally low purchase price. Had this been done, there would have been ample justification for the application of the principle of public policy so as to enable the plaintiff to succeed. In so far as concerns the problem of ascertaining the *situs* of property, the difficulty is, of course, far greater in the case of incorporeal than in the case of corporeal property. Often, as in the case of Germany at the present time, the problem can only be solved by means of Solomonic considerations of equity. The problem posed in the *Knäckebröt* case was finally solved in this way by the Court of Appeal of Hamburg, which allowed a registered trade mark to be split so as to entitle the owner to use it in Western Germany, and the East German Government, which had nationalized his business in the Soviet zone, to use it in Eastern Germany. This somewhat exceptional state of affairs, however, does not entitle us to make the question of *situs* generally dependent on nebulous considerations of equity, as the author would have us do (at p. 102). The rules of the conflict of laws are too well-established to be lightly discarded merely because exceptional cases may occasionally justify a more equitable solution.

The author rightly devotes separate chapters to the legal principles applicable to the confiscation of companies and to so-called acts of quasi-confiscation. Among the latter he includes more especially confiscation disguised as expropriation (in the sense in which he understands the latter term) by means of confiscatory taxes, enforced bankruptcy, and the application of onerous exchange control laws. Lastly, he deals with expropriation as such, as distinct from confiscation. He doubts whether the view that expropriation, like confiscation, is incapable of vesting title in property situate outside the borders of the confiscating State still holds good. This doubt is fully justified in view of such cases as *The Athanasios* (1915), 228 Fed 558, and *Lorentzen v. Lydden*, [1942] 2 K.B. 202, though the authority of the latter case was somewhat shaken in *Bank voor Handel en Scheepvaart N.V. v. Slatford (sued as Custodian of Enemy Property) and Another*, [1952] 1 All E.R. 314, certainly in so far as concerns the aspect of public

policy. The requisitioning decrees of the various Governments-in-exile during the last war are part of a development which has not as yet been fully explored in all its legal implications, and for this reason no criticism is intended by saying that the legislation of such Governments has not been dealt with in as much detail as the other problems posed by confiscation and expropriation. On the other hand, the full use made by Dr. Seidl-Hohenveldern of the relevant case law of most of the leading countries makes his book a valuable contribution to a subject which often causes lawyers to despair of arriving at a solution which can be called truly just and equitable.

F. HONIG

La Responsabilità Internazionale dello Stato per Atti Legislativi. By EDOARDO VITTA. Studi di Diritto Internazionale, diretti da Roberto Ago e Giorgio Balladore Pallieri. Volume 17. Milan: Dott. A. Giuffrè. 1953. 158 pp. Lire 800.

It is surprising, as Professor Vitta remarks, that the responsibility of States for legislative acts has scarcely been regarded as a subject for systematic study. Yet every student of international law is familiar with, and constantly reminded of, the existence of at least two rules of paramount importance. The first is that no State can take shelter behind its own legislation in order to avoid international responsibility. The second has established itself in the form that the exhaustion of local remedies is not required where responsibility in international law is predicated upon an initial breach of international law resulting from legislation contrary to international law. Professor Vitta has accomplished the task of placing these rules within their systematic setting. The result is an attractive study of general interest.

After considering State responsibility in international law as a general problem of law regarding liability in damages for illegal acts, the author turns to the question to whom responsibility is to be attributed in international law. He then considers whether and to what extent liability is linked with the requirement of blame as a mental element. Having disposed of these general and preliminary matters he examines, in Chapter IV, the extent to which municipal legislation can be a factor constituting an international wrong. He rightly perceives that this problem may arise either in connexion with legislation in contravention of a treaty, or as a result of municipal law infringing customary rules of international law. In Chapter V the author considers the question—which looms constantly in the background during the previous discussion—whether the very fact of legislation contrary to international law having been enacted attracts international responsibility, or whether this legislation must have been put into operation by executive action. It appears that a distinction must be drawn between legislation which is self-executory and legislation which requires further implementation, but the comments of the author on this important aspect of the question are not entirely clear (p. 88).

Professor Vitta contributes some interesting observations on the question whether the local remedies must be exhausted where the breach of international law is an initial one, and sides finally with those who hold that the exhaustion of local remedies is not required in these circumstances. (Perhaps a discussion of the *Finnish Ships* case would have been of assistance here.) In this connexion the author discusses two further problems. The first is whether the requirement that the local remedies must be exhausted

is procedural or substantive. The result is somewhat inconclusive. Probably it would have benefited from the introduction of the following distinction: where the breach is an initial breach of international law by legislative action, the requirement of exhaustion of local remedies cannot normally extend to the merits of the case unless the Constitution of the country concerned sanctions the supremacy of international law. The position is different where the international claim is predicated on the ground that an alien has been injured through judicial or executive acts contrary to the domestic law of the country concerned. The author has some interesting observations to make on the hitherto little discussed problem of the need to exhaust local remedies where the Constitution provides for a final review of the legislation on the question from the point of view of its compatibility with international law. He concludes this part of his survey with some sobering thoughts on the problem whether an international court can annul municipal legislation which violates international law.

The last part of the book is taken up by a study of the attitude of international law towards expropriation, nationalization and confiscation. This survey is indeed essential to round off a discussion on international responsibility for acts of legislation, seeing that the majority of cases fall within the sphere of the protection of property. The author sides, on the whole, with those who favour an absolute standard of full and effective compensation, though he recognizes modern trends to reduce the amount of compensation, with special regard to the financial capacity of the expropriating State, particularly in the case of a far-reaching social reform.

The book is written in a clear and concise style. The author gives careful and judicious attention to the practice of States and of international tribunals. His method of systematic exposition enables him to present his views on a variety of topics of a general character. This may lead occasionally to the impression that the immediate object of this study has become somewhat overlaid by general considerations on State responsibility, but the ensuing benefit, in terms of systematic treatment, is undeniable.

K. LIPSTEIN

Documents and Speeches on British Commonwealth Affairs, 1931-1952. Edited by NICHOLAS MANSERGH. 2 Volumes. Issued under the auspices of the Royal Institute of International Affairs. London: Oxford University Press. 1953. xli+1308 pp. £4. 4s. od.

Professor Mansergh has performed a notable service by the publication of these volumes and by the manner in which he has acquitted himself of his task. They provide an invaluable source of information on practically all aspects of the international position of the Commonwealth and its members in the most crucial period of its history, and on the constitutional problems of the Commonwealth. The 'Documents' consist mainly of legislation, constitutional texts, and official statements. They cover admirably a very wide range of subjects, beginning with the Statute of Westminster and the successive measures, with regard to the removal of inequalities of status, adopted to implement it in such matters as abolition of appeals to the Judicial Committee of the Privy Council, provision for the delegation of the exercise of royal authority to the Governors-General in the Dominions, the royal style and titles, and the power of constitutional amendment. There follow Sections on the Commonwealth economic policies in 1932-4; foreign policy and defence in that period; the events connected with the abdication of King Edward VIII and the Coronation of King George VI; the Indian constitutional

reforms between 1931 and 1939; the relations, in that period, between the Irish Free State and the Commonwealth; problems of foreign policy within the Commonwealth prior to the outbreak of the Second World War; the manner in which its members declared their belligerency in 1939; the methods of consultation and co-operation during and after the termination of the war; the history and the problems arising out of the recognition of the independence of and transfer of power to India, Ceylon, and Burma; the declaration of the Irish and Indian Republics; the incorporation of Newfoundland in Canada; the various sources of tension within the Commonwealth, such as the Kashmir dispute, the treatment of Indians in the Union of South Africa, and the future of the High Commission Territories; the financial and economic policies of the Commonwealth and its members and their participation in the search for international security through the United Nations and within the framework of a Western European Federation, the North Atlantic Community, and Security in the Pacific.

This bare enumeration of topics may perhaps give a general notion of the wide range of subjects covered in these two massive volumes. It hardly conveys an adequate impression either of the care and discrimination with which Professor Mansergh has collected his material or of its usefulness. Thus—to mention only the Chapter on Nationality within the Commonwealth—the reviewer knows of no publication, official or private, which is more likely to assist the student in mastering the novelty and the implications of the system of nationality within the Commonwealth which results from the legislation after the Second World War and the basic aspects of which are analysed in Mr. Clive Parry's article in this volume of the *Year Book*. Professor Mansergh, and the Royal Institute of International Affairs under whose auspices these volumes appear, deserve the thanks of students both of international law and of the constitutional law of the Commonwealth and its members.

H. L.

International Law, Cases and Materials. By WILLIAM W. BISHOP, JR. New York: Prentice-Hall Inc. 1953. xxvi+735 pp.

The post-war years have seen new editions of the already well-known case-books of Professors Hudson, Briggs, and Fenwick, the rewriting and reappearance of Professor Dickinson's book under a new title, and the production of Professor Sohn's *Cases and Materials on World Law*. But Professor Bishop is the first to produce an entirely new American case-book on international law proper. One thus opened it, when it made its appearance some time ago in mimeograph form, with some curiosity as to how the author had dealt with the situation created by the greater importance claimed for the organizational aspects of international law today. His attitude in this matter is made unmistakable. 'The emphasis', he writes, 'has been placed on international law as it applies in courts and in dealings between nations, rather than upon international organization or upon the non-legal factors in international relations' (p. x). It is easier to concur in this choice than to be happy about the implications of Professor Bishop's further explanation that 'the point of view of the book is frankly American—that of the American lawyer and the Department of State of the United States'; but it requires to be said that this statement is qualified by the addition that 'there is an effort to present a rounded picture of international law rather than merely the views expressed by the United States'. It is of course an old tradition of American writers, going back to

Wharton, to state the law, in the words of the title to Hyde, 'Chiefly as Interpreted and Applied by the United States'. But if this approach can be held to justify the printing of the United States' acceptance of the Optional Clause, together with the exception therein of 'disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America *as determined by the United States of America*' without any commentary on the words here italicized (though with a footnote reference to the commentaries of others) (cf. p. 58), it is at least open to criticism. However, the whole question of 'domestic jurisdiction' is summarily handled: the *Tunis and Morocco Nationality Decrees* case is printed in part (pp. 308-11), and there is a half-page note on that case and on Article 2 (7) of the Charter (pp. 462-3), but nothing more. Perhaps the general exclusion of international organization accounts for this.

If, however, Professor Bishop declines to enter the chosen field of Professor Sohn, he does not ignore the general treaty. On the contrary, he devotes a lengthy chapter to 'International Agreements' specifically 'in view of [their] importance today . . . in our international legal system, which relies upon them both for the substantive content of many of its rules and as the means of bringing about progress in the law and the establishment of international organizations . . .' (p. ix). But it is to be confessed that the reader cannot very easily get from this Chapter any such precise picture of the American law and practice of international agreements as the national viewpoint of the book might lead him to expect to find. For the author contents himself with asking such questions as: 'How far does the power to make executive agreements extend, particularly when co-operation of both Houses of Congress is obtained?' (p. 86), and with such statements as that: 'There has been much discussion of the consequences of failure to abide by constitutional requirements concerning the making of treaties' (p. 88). Nor does the book go as deeply into the American doctrine of recognition as could have been expected—though other doctrines are by no means ignored.

No doubt an at least partial explanation of Professor Bishop's selection of his approach and of his treatment and of some little inconsistency between the two is that he is writing a case-book of the sort American law-schools have developed, to be used principally in those schools. The book is designed 'for use in a three-hour, one-semester introductory course in international law offered to law students' (p. ix). That is to say, it will be used in connexion with a series of some 45 hourly sessions between students and teacher during which the teacher will regard it as more his function to state problems than to solve them. The students are unlikely to read anything else. And the course will commonly be an elective one against which a certain bias will exist because of its apparent lack of 'bread and butter' quality. The author clearly considers that he has a serious problem of 'salesmanship', and he has thus written a special 'Foreword to the Student' (pp. xiii-xvii) the upshot of which is, in Wigmore's quoted words, that 'virtually every principle of international law has had application in our United States practice, and is still potential of a fee to be earned by a practitioner'.

Professor Bishop, despite the fact that he is writing primarily with a view to the peculiar 'market conditions' described, expresses the hope that 'The book [will] also be of interest and help to the lawyer or layman who wishes to get through unaided study a better understanding of the legal side of international life' (p. ix). No doubt his expectations in this direction will be handsomely fulfilled. He has not performed quite the feat of inclusiveness Professor Briggs achieved with the second edition of his *Law of Nations* (1952), a considerably bigger book. On the other hand, he has been able to avoid the excessive curtailing of reports apparently forced on Professor Hudson in connexion with the third edition of his *Cases on International Law* (1951). He has not

produced a 'mere case-book', such as the work last named largely tends to be, but has rather followed the plan of Professor Dickinson's original *Cases and Readings* (1929) and has included much that is not pure case. This is useful to the student who will read nothing outside the covers of 'the book of the course', though there is an irresistible reminder of the seventeenth century in it for others. One expects the excerpts to be introduced by some such rubric as 'Hear the comfortable words of Oppenheim'. Professor Bishop's favourite witness by far is, by the way, *Hackworth's Digest*—which of course his general approach and his problem of 'salesmanship' explains.

In another way Professor Bishop tends also to follow Professor Dickinson—this time the latter's *Cases on International Law* (1950) rather than its forerunner. For the arrangement of the material is schematic rather than traditional. The Chapter on International Agreements mentioned is preceded by one on Nature, Sources, Application. And it is followed by Chapters the titles of which are Membership in the International Community, Territory, Nationality, Jurisdiction, State Responsibility and International Claims, and, finally, Force and War. This arrangement of course hints at a certain philosophy. And it involves, incidentally, the somewhat curious assignment of the question as to the extent of territorial waters and their delimitation to the Chapter on Jurisdiction, and a frank adoption of an international legal concept of 'tort'. But the philosophy is never obtrusive. Professor Bishop relies heavily on the cases and has used the *Annual Digest and Reports* more thoroughly than any of his predecessors. He has put before the student a great number of cases the latter would not ordinarily come across. One could have wished to see these introduced by a more thorough discussion of the theory of the application of international law in municipal courts than is to be found at pp. 60–68. But any dissatisfaction which may be felt at the author's failing to be more expansive—or more explicit—on theoretical questions must be suppressed when his aim to provide only an introductory work is recalled. That aim he has achieved with distinction.

CLIVE PARRY

The International Law Standard in Treaties of the United States. By ROBERT R. WILSON. Cambridge, Massachusetts: Harvard University Press. 1953. xii+321 pp. \$4.50.

The scope and importance of this book are greater than its limited title seems to indicate. The apparent object of the work is to survey and classify the treaties which have been concluded by the United States and which contain a reference to international law. Professor Wilson has found, as the result of a careful survey of the entire field—a no mean task—'over two hundred references in terms of the "law of nations" or "international law" (or equivalents of these terms) in the intergovernmental agreements to which the United States has become a party' (p. 11). He classifies these references, in a clear and illuminating manner, as bearing upon treaties of pacific settlement, in particular as determining the sources of the decisions of arbitral tribunals; extradition treaties; treaties bearing upon war and neutrality; treaties laying down that the public agents, such as consuls, or nationals of the parties shall be accorded a standard of treatment in accordance with international law; and, finally, treaties relating to navigation rights and to maritime and fluvial frontiers. In an Appendix the learned author gives a concise survey, from this point of view, of the practice of the Great Powers between 1900 and the Second World War.

All this seems to be purely informative and somewhat statistical. In fact, the book is a valuable contribution, from the point of view of both research and legal analysis, to the history and doctrine of international law. It is based to a large extent on an examination of the records, many of them unpublished, of the State Department and other official sources. Professor Wilson wears his scholarship lightly, without ostentation or pretentious claims to the discovery of inductive or similar methods. The book represents nevertheless—or perhaps for that very reason—scholarship of a high quality. The author sheds new light on the notions of equity and public law as used in arbitration treaties. He refers in this connexion to the award in the *Lebret* case, decided by the French-American Commissioners under the Treaty of 1880, in which the Umpire described as part of 'the public law of the world' the principle that the wife must follow the nationality of her husband—a principle of which little has remained in modern legislation. In another part of the book Professor Wilson makes an interesting contribution to the history and application of the rule relating to the exhaustion of local remedies and, in connexion with treaties of commerce, to the development of the law relating to navigation on international rivers. There follows a stimulating account of some aspects of the history of intervention and of the law of neutrality—in particular in the matter of the 'rules' of the *Alabama* Award—a part of the book in which the results of the learned author's historical researches reveal fully the value of this unassuming but important addition to the history of international law. Professor Wilson has contrived at the same time to link up his narrative with judicious observations on contemporary problems, such as the legal nature of the Uniting for Peace Resolution adopted in 1950 by the General Assembly (p. 241) or the import of the reservation of the United States to its acceptance of the jurisdiction of the International Court of Justice inasmuch as it withholds from the competence of the Court 'disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America'. The author makes the interesting suggestion that the consistency of that reservation with Article 36 of the Statute of the Court 'may conceivably become the subject of judicial decision' (p. 44). While comment on that suggestion may be premature, it shows that Professor Wilson's prodigious use of official sources has not impaired his independence of judgment. This is a further reason why the student and the practitioner of international law must regard this book as a contribution of permanent value to the literature of international law.

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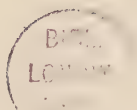
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